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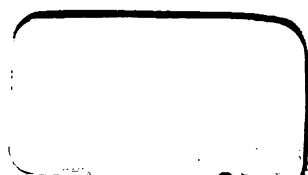
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A
T R E A T I S E
ON
CRIMES
AND
INDICTABLE
MISDEMEANORS.

IN TWO VOLUMES.

VOL. II.

SECOND EDITION,
WITH CONSIDERABLE ADDITIONS.

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A

TREATISE

ON

Crimes and Misdemeanors.

BOOK THE FOURTH.

OF OFFENCES AGAINST PROPERTY, PUBLIC OR PRIVATE.

CHAPTER THE FIRST.

OF BURGLARY.

It is laid down in the more ancient authorities that the offence of burglary may be committed by the felonious breaking and entering of a church, and the walls or gates of a town, in time of peace, as well as by the felonious breaking and entering of a private house. (a) But the more material enquiry at the present day relates to the breaking and entering of private houses, or, in the language of the books, the mansion-houses of individuals: and

Definition of
the offence.

(a) Staundf. P. C. 30. 23 Ass. pl. 95. Britt. c. 10. Dalt. c. 99. Crom. 31. Spelm. *in verb. Burglaria*. In 3 Inst. 64, Lord Coke gives as a reason for considering the breaking and entering the church as a burglary, that the church is *domus mansionalis omnipotentis Dei*: but Hawkins says that he does not find this nicety counted.

nanced by the more ancient authors; and that the general tenor of the old books seems to be that burglary may be committed in breaking houses, or churches, or the walls, or gates of a town. 1 Hawk. P. C. c. 38. s. 17. And in 4 Black. Com. 284. it is stated that breaking open a church is undoubtedly burglary.

this species of the offence appears to be well described, as—*A breaking and entering the mansion-house of another in the night, with intent to commit some felony within the same, whether such felonious intent be executed or not.* (b)

Pursuing the order of this definition, we may consider, I. Of the breaking and entering: II. Of the mansion-house: III. Of the time; namely, the night: IV. Of the intent to commit a felony.

A breaking and entering are both necessary.

I. Notwithstanding some loose opinions to the contrary, which may have been formerly entertained, it is now well settled that both *a breaking and entering* are necessary to complete the offence of burglary. (c)

With respect to the breaking, it is agreed that it is not every entrance into a house, in the nature of a mere trespass, which will be sufficient, or satisfy the language of the indictment, *felonice et burglariter fregit.* (d) Thus, if a man enter into a house by a door, or window, which he finds open, or through a hole which was made there before, and steal goods; or draw goods out of a house through such door, window, or hole, he will not be guilty of burglary. (e) There must either be an actual breaking of some part of the house, in effecting which more or less of actual force is employed; or a breaking by construction of law, where an entrance is obtained by threats, fraud, or conspiracy.

(b) 3 Inst. 63. 1 Hale 549. Sum. 79. 1 Hawk. P. C. c. 38. s. 1. 4 Black. Com. 224. 2 East. P. C. c. 15. s. 1. p. 484. 1 Burn. Just. *Burglary*, S. 1. The word *burglar* is supposed to have been introduced from Germany by the Saxons; and to be derived from the German, *burg*, a house, and *larron*, a thief; the latter word being from the Latin, *latro*. 1 Burn. Just. *Burgl.* S. 1. 2 East. P. C. c. 15. s. 1. p. 484. But Sir H. Spelman thinks that the word *burglaria* was brought here by the Normans, as he does not find it amongst the Saxons: and he says that *burglatores*, or *burgatores*, were so called, *quod dum alii per campos latrocinantur eminus, hi burgos pertinacius effringunt, et deprædantur*. The crime, however, appears to have been noticed in our earliest laws, in the common genus of offences denominated *Hamsecken*; and by the ancient laws of Canutus, and of H. 1. to have been punishable with death. Ll. Canuti, c. 61. Hen. I. c. 13. 1 Hale, 547. citing Spelm. Gloss. tit. *Hamsecken*, and *ibid.* tit. *Burglaria*. Originally, the circumstance of *time*, which is now of the very essence of the offence, does not seem to have been material; and the malignity of the crime was supposed to consist merely in the invasion on the right of habitation, to which the laws of

England have always shewn an especial regard, herein agreeing with the sentiments of ancient Rome, as expressed in the words of Cicero: *Quid enim sanctius, quid omni religione munius, quam domus uniuscujusque civium? Hic aræ sunt, hic foci—hoc perfugium est illa sanctum omnibus, ut inde abripi neminem fas sit.* The learned editor of Bacon's Abridgment says that his researches had not enabled him to discover at what particular period *time* was first deemed essential to the offence; but that it must have been so settled before the reign of E. VI. as in the fourth year of that king it is expressly laid down that it shall not be adjudged burglary, *nisi ou le infreinder del meason est per noctem*, (Bro. tit. Corone, pl. 185) and that, two years before, *per noctem* is introduced (*Id.* pl. 180.) as of course in the mention of the offence. 1 Bac. Ab. *Burglary*, 539. (ed. 1807.) And see 3 Inst. 65.

(c) 1 Hawk. P. C. c. 38. s. 3. 1 Hale 551. 4 Black. Com. 226.

(d) 3 Inst. 64, 1 Hawk. P. C. c. 38. s. 4. 1 Hale 551, 552.

(e) *Id. Ibid.* For if a person leaves his doors or windows open, it is his own folly and negligence; and if a man enters therein it is no burglary. 4 Black. Com. 226.

An actual breaking of the house may be by making a hole in the wall; by forcing open the door; by putting back, picking, or opening the lock with a false key; by breaking the window; by taking a pane of glass out of the window, either by taking out the nails or other fastenings, or by drawing or bending them back, or by putting back the leaf of a window, with an instrument. And even the drawing or lifting up the latch, where the door is not otherwise fastened; the turning the key where the door is locked on the inside; or the unloosing any other fastening, which the owner has provided, will amount to a breaking. (*f*)

Of an actual
breaking.

Thus where a window opening upon hinges, is fastened by a wedge, so that pushing against it will open it, and such window be forced open by pushing against it, there will be a sufficient breaking. It appeared that the prisoner got into the prosecutor's cellar, by lifting up a heavy grating, and into his house by forcing open a window which opened on hinges, and was fastened by two nails, which acted as wedges, but would open by pushing. He was convicted; and upon a case reserved, the Judges held the forcing open the window to be a sufficient breaking, and that the conviction was right. (*g*) So pulling down the sash of a window is a breaking, though it has no fastening, and is only kept in its place by the pulley weight: and it makes no difference that there is an outer shutter which is not closed. The prisoner entered a house by pushing down the upper sash of a window, which had no fastening, and was kept in its place by the pulley weight only. There was an outer shutter, but it was not put to. A case was reserved upon the question whether the pushing down the sash was a breaking, and all the judges were unanimous that it was. (*h*)

It was doubted on one occasion whether a thief, getting into a house by creeping down the chimney, could be found guilty of burglary, as the house, being open in that part, could not be said to have been actually broken; (*i*) but it was afterwards agreed that such an entry into a house will amount to a breaking, on the ground that the house is as much closed as the nature of things will permit. (*k*)

And it has lately been decided, that getting into the chimney of a house is a sufficient breaking and entering to constitute burglary, though the party does not enter any of the rooms of the house. The prisoner got in at the top of a chimney, and got down to just above the mantle-piece of a room on the ground floor. A case was reserved upon the question, whether this was a breaking and entering of the dwelling-house; and two of the judges thought it was not, because the party could not be considered as being in the

(*f*) 1 Hale 552. 3 Inst. 64. Sum, 80. 1 Hawk. P. C. c. 38. s. 6. 2 East. P. C. c. 15. s. 3. p. 487.

(*g*) *Rex v. Hall*, East. T. 1818. Russ. & Ry. 355.

(*h*) *Rex v. Haines and Harrison*, East. T. 1821. Russ. & Ry. 451.

(*i*) 1 Hale 552, where the learned author says that he was doubtful whether it was burglary, and so were

some others; but that upon examination it appeared that in the creeping down of the prisoner, some of the bricks of the chimney were loosened, and fell down in the room, which put it out of question; and direction was given to find it burglary.

(*k*) *Crompt*. 32 (*b*) *Dalt*. 253. 1 Hawk. P. C. c. 38, s. 6. 2 East. P. C. c. 15. s. 2. p. 485.

dwelling house, not having got below the chimney-piece ; but the ten other judges held otherwise on the ground that the chimney was part of the dwelling-house, that the getting in at the top was a breaking of the dwelling-house, and that the lowering himself by the party was an entry within the dwelling-house. (*l*)

Brown's case.
Breaking,
where there
were no in-
terior fasten-
ings.

A case is reported, in which the breaking was holden to be sufficient, though there was no interior fastening to the doors which were opened. It appeared that the place which the prisoner entered was a mill, under the same roof, and within the same curtilage, as the dwelling house : that through the mill there was an open entrance, or gateway, capable of admitting waggons, and intended for the purpose of loading them more easily with flour, by means of a large aperture or hatch, over the gateway, communicating with the floor above ; and that this aperture was closed by folding doors with hinges, which fell over it, and remained closed by their own weight, but without any interior fastening ; so that persons on the outside, under the gateway, could push them open at pleasure, by a moderate exertion of strength. It was proved that the prisoner entered the mill in the night, by so pushing open the folding doors, with the intention of stealing flour ; and this was holden to be a sufficient breaking by the learned judge, who tried the prisoner ; and the prisoner was accordingly convicted of burglary. (*m*)

Callan's case.
Where the fast-
ening of a
trap-door or
flap of a cellar
was only such
as was caused
by the com-
pression of its
natural
weight ; it was
doubted whe-
ther the open-
ing it consti-
tuted a suffi-
cient break-
ing.

But doubts were entertained whether lifting up the trap door or flap of a cellar, which was kept down solely by its own weight, was a sufficient breaking ; such trap door or flap being used for the purpose only of taking in liquors to the cellar, and not as a common entrance for persons. The prisoner was indicted for stealing some bottles of wine in a dwelling-house, and afterwards burglariously breaking out of the house. It appeared in evidence, that the wine was taken from a bin in the cellar of the house, which was a public-house, and removed by the prisoner from the bin to the trap-door, or flap, of the cellar, in getting out of which he was apprehended. The cellar was closed on the outside, next the street, only by the flap, which had bolts belonging to it, for the purpose of bolting it on the inside, and was of considerable size, being made to cover the opening through which the liquors consumed in the public-house were usually let down into the cellar. The flap was not bolted on the night in question : but it was proved to have been down ; in which situation it would remain, unless raised by considerable force. When the prisoner was first discovered, his head and shoulders were out of the flap ; and upon an attempt being made to lay hold of him, he made a spring, got quite out, and ran away, when the flap fell down, and closed in its usual way, by its own weight. Upon this evidence it was doubted whether there was a sufficient breaking to constitute the crime of burglary ; and, the prisoner having been convicted, the question was saved by the learned judge who pre-

(*l*) *Rex v. Brice*, East. T. 1821.
Russ. & Ry. 450.

1799, *cor. Buller, J.*, 2 East. P. C. c.
15, s. 3. p. 487.

(*m*) *Brown's case*, *Winton*, Spr. Ass.

sided at the trial, for the opinion of the twelve judges, who were divided in opinion as to this being a sufficient breaking. (n)

The book 22 Assiz. 95., in which burglary is defined as the breaking of houses, churches, *walls*, courts, or gates in time of peace, is referred to by Lord Hale, as seeming to lead to the conclusion, that where a man has a wall about his house for its safeguard, if a thief should in the night-time break such wall, or the gate thereof, and finding the doors of the house open, should enter the house, it would be burglary; though it would be otherwise if the thief should get over the wall of the court, and so enter through the open doors of the house. (o) But upon this it has been remarked, that the doctrine referred to by Lord Hale was anciently understood only as relating to the walls or gates of a city; and did not, therefore, support his conclusion, when he applied it to the wall of a private house. (p) And the distinction between breaking and coming over the gate or wall is spoken of by an able writer as being over-refined: for if, as he observes, the gate or wall be part of the mansion for the purpose of burglary, and be inclosed as much as the nature of the thing will admit of, it seems to be immaterial whether it be broken or overleaped, and more properly to fall under the same consideration as the case of a chimney; and that if it be not part of the mansion-house for this purpose, then whether it be broken or not is equally immaterial, as in neither case will it amount to burglary. (q)

Breaking a wall, built about a house for its safeguard.

A door, wall, or other fence forming part of the outward fence of the curtilage and opening into no building, but into the yard only, was held not to be such a part of the dwelling-house as that the breaking thereof would constitute burglary; and it was held to make no difference that the door broken was the entrance to a covered gateway, and that some of the buildings belonging to the dwelling-house and within the curtilage, were over the gateway, and that there was a hole in the ceiling of the gateway for taking up goods into the building above. The prosecutor had a dwelling-house, warehouses, and other buildings, and a yard; the entrance into the yard was through a pair of gates which opened into a covered way; over this way were some of the warehouses, and there was a loop-hole and crane over the gates to admit of goods being craned up; and there was also a trap-door in the roof of the covered way; there was free communication from the warehouses to the dwelling-house: the prisoners broke open the gates in the night with intent to steal, and entered the yard, but did not enter any of the buildings; and, upon a case reserved, the judges were unanimous, that the outward fence of the curtilage, not opening into any of the buildings, was no part of the dwelling-house, and the prisoners were discharged. (r) So an area gate opening into

Breaking the outer fence of the curtilage. And as to buildings within the curtilage, see 7 & 8 G. 4. c. 29. s. 13. *post.* p. 14.

(n) Callan's case, *cor.* Lord Ellenborough, C. J., O. B. November, 1809. Mich. T. 1809. MS. Bayley J., and Russ. & Ry. 157. This case approaches very closely to Browne's case, *ante* 4.

(o) 1 Hale 559.

(p) Note (n) 1 Hale 559, ed. 1800.

(q) 2 East P. C. c. 15. s. 3. p. 488.

(r) Rex v. Bennett and another, Hil. 1815. MS. Bayley J., and Russ. & Ry. 289.

Breaking an
area-gate.

the area only, is not such part of the dwelling-house, that the breaking of the gate will be burglary, if there be any door or fastening to prevent persons in the area from entering the house, although such door or other fastening may not be secured at the time. The prisoners opened an area-gate in a street in London, and entered the house through a door in the area, which happened to be open, but which was always fastened when the family went to bed, and was one of the ordinary barriers against thieves. Having stolen in the house to the value only of 39s., a question was made whether the breaking the area gate was breaking the dwelling-house, so as to constitute burglary; and as there was no free passage in time of sleep from the area into the house, the judges held unanimously that the breaking was not a breaking of the dwelling-house. (s)

The breaking
may be of an
inner door of
the house.

It should be observed that the breaking requisite to constitute a burglary is not confined to the external parts of the house, but may be of an inner door, after the offender has entered by means of a part of the house which he has found open. Thus, if A. enter the house of B. in the night time, the outward door being open, or by an open window, and, when within the house, turn the key of a chamber door, or unlatch it, with intent to steal, this will be burglary. (t) So where the prisoners went into the house of the cook at Serjeant's Inn, in Fleet-street, to eat, and taking their opportunity, slipped up stairs, picked open the lock of a chamber door, broke open a chest, and stole plate, it was agreed that the picking open the lock of the chamber door, ousted them of their clergy, though the breaking open the chest would not have done so. (u) And it will also amount to burglary if a servant in the night time open the chamber door of his master or mistress, whether latched or otherwise fastened, and enter for the purpose of committing murder or rape, or with any other felonious design; or if any other person, lodging in the same house, or in a public inn, open and enter another's door, with such evil intent. (v) But it has been questioned whether, if a lodger in an inn should, in the night time, open his chamber door, steal goods, and go away, the offence would be burglary; on the ground of his having a kind of special property and interest in his chamber, and the opening of his own door being therefore no breaking of the innkeeper's house. (x)

Qu. As to the
breaking of
cupboards,
&c. fixed to
the freehold.

It is clear that the breaking open of a chest, or box, by a thief who has entered by means of an open door or window, is not a kind of breaking which will constitute burglary, because such

(s) *Rex v. Davis and another*, Hil. 1617, MS. Bayley J., Russ. & Ry. 322. p. 488. Gray's case, 1 Str. 481. Sum. 83, 84. 1 Bac. Ab. *Burglary* (A.)

(t) 1 Hale 553. 1 Hawk. P. C. c. 38. s. 6. Johnson's case, Mich. T. 1786, 2 East. P. C. c. 15. s. 4. p. 488.

(u) Anon. 1 Hale 524.

(v) 1 Hale 553, 554. 4 Blac. Com. 227. Bingle's case, 3 W. & M. MS. Denton, cited 2 East. P. C. c. 15. s. 4.

(x) 1 Hale 554. But upon this it is observed, that if another person should open such lodger's door burglariously, it must be laid to be the mansion of the innkeeper, and that a guest may commit larceny of the things delivered to his charge. 3 East. P. C. c. 15. s. 4. p. 488.

articles are no part of the house. (y) But the question with respect to the breaking of cupboards, and other things of a like kind, when affixed to the freehold, has been considered as more doubtful. Thus, at a meeting of the judges, upon a special verdict, to consider the point, whether breaking open the door of a cupboard let into the wall of the house were burglary or not, it appears that they were divided upon the question. (z) But Lord Hale says, that such breaking is not burglary at common law. (a) And Mr. J. Foster thinks that, with regard to cupboards, presses, lockers, and other fixtures of the like kind, a distinction should be taken, in favour of life, between cases relative to mere property, and such wherein life is concerned. He says, "In questions between the heir or devisee, and the executor, those fixtures may, with propriety enough, be considered as annexed to, and parts of the freehold. The law will presume, that it was the intention of the owner, *under whose bounty the executor claims*, that they should be so considered; to the end that the house might remain to those who, by operation of law, or by his bequest, should become entitled to it, in the same plight he put it, or should leave it, entire and undefaced. But in capital cases, I am of opinion that such fixtures which merely supply the place of chests, and other ordinary utensils of household, should be considered in no other light than as mere moveables, partaking of the nature of those utensils, and adapted to the same use." (b)

Though it was said to be the law, that the entering into the house of a person, without breaking it, with an intent to commit some felony, and afterwards breaking the house in the night-time to get out, was burglary; yet, the doctrine was questioned by great authority: (c) and it was thought expedient to remove the doubt by legislative enactment. This was first done by the statute 12 Anne, stat. 1. c. 7. s. 3. now repealed by the 7 and 8 G. 4. c. 27.; and the statute 7 and 8 G. 4. c. 29. s. 11. contains the following enactment upon the subject, namely, "It is hereby declared that if any person shall enter the dwelling-house of another with intent to commit felony, or being in such dwelling-house, shall commit any felony, and shall in either case, break out of the said dwelling-house, in the night-time, such person shall be deemed guilty of burglary."

Of a breaking out of the house.

Having mentioned these points relating to an actual breaking,

(y) 1 Hale 523, 524, 555. 1 East. P. C. c. 15. s. 5. p. 488, 489.

(z) Post. 108. citing MS. Denton. The meeting of the judges was in January 1690.

(a) 1 Hale 527.

(b) Post. 109. And see 2 East. P. C. c. 15. s. 5. p. 489.

(c) By Lord Holt and Trevor C. J. in Clarke's case, O. B. 1707. 2 East. P. C. c. 15. s. 6. p. 490. And the question is also stated in 1 Hale 554.

where he says, "If a man enter in the night time by the doors open, with the intent to steal, and is pursued, whereby he opens another door to make his escape; this, I think, is not burglary, against the opinion of Dalt. p. 253. (new edit. p. 487.) out of Sir Francis Bacon; for *fregit et exiit, non fregit et intravit*." Lord Bacon thought it was burglary. Elem. 65.

Of a breaking
by construc-
tion of law.

By threats.

we may now enquire concerning a breaking by construction of law, where an entrance is obtained by threats, fraud, or conspiracy.

Where in consequence of violence commenced or threatened, in order to obtain entrance to a house, the owner, either from apprehension of the violence, or in order to repel it, opens the door, and the thief enters, such entry will amount to a breaking in law: (*d*) for which some have given as a reason that the opening of the door by the owner, being occasioned by the felonious attempt of the thief, is as much imputable to him as if it had been actually done by his own hands. (*e*) And in a later case where the evidence was, that the family within the house were forced by threats and intimidation, to let in the offenders, Thomson, B. told the jury that although the door was, literally, opened by one of the family, yet if such opening proceeded from the intimidations of those who were without, and from the force that had been used, knocking at and breaking the windows, calling out and insisting upon the door being opened, and firing of guns, if under these circumstances the persons within were induced to open the door, it was as much a breaking by those who made use of such intimidations to prevail upon them so to open it, as if they had actually burst the door open. (*f*) But if, upon a bare assault upon a house, the owner fling out his money to the thieves, it will not be burglary; (*g*) though if the money were taken up in the owner's presence, it is admitted that it would be robbery. (*h*) And though the assault were so considerable as to break a hole in the house; yet if there were no entry by the thief, but only a carrying away of the money thrown out to him by the owner, the offence could not, it should seem, be burglary, though certainly robbery. (*i*)

Where an act is done *in fraudem legis*, the law gives no benefit thereof to the party. Thus if thieves, having an intent to rob, raise hue and cry, and bring the constable, to whom the owner opens the door, and they, when they come in, bind the constable, and rob the owner, it is burglary. (*k*) And, upon the same principle, the getting possession of a dwelling house by a judgment against the casual ejector, obtained by false affidavits without any

(*d*) Crompt. 32. (*a*) 1 Hale 553. 2 East. P. C. c. 15. s. 2. p. 486.

(*e*) 1 Hawk. P. C. c. 38. s. 7.

(*f*) Rex v. Swallow and others, cor. Thomson, B. York, Jan. 1813, MS. Bayley, J. The prisoners were convicted, and executed.

(*g*) 1 Hawk. P. C. c. 38. s. 3.

(*h*) Sum. 81. 2 East. P. C. c. 15. s. 2. p. 486.

(*i*) 1 Hale 555: but he says, that some have held it burglary, though the thief never entered the house; and that it is reported to have been so adjudged by Saunders, chief baron. Crompt. 31 b. Lord Hale subjoins to this doctrine *tamen quare*; and cer-

tainly, as a part of the statement of the case is, that there was *no entry* into the house, and as an entry is, as will be presently shewn, as essential a part of the offence as the breaking, it seems difficult to discover the ground on which it could have been ruled to be burglary. The editor of Lord Hale (ed. 1800) states in a note, that it was adjudged by Montague, chief justice of the C. B. and that Saunders only related it.

(*k*) 3 Inst. 64. 1 Hale 552, 553. Sum. 81. Crompt. 32 b. Kel. 44, 82. 1 Hawk. P. C. c. 38. s. 10. 4 Black. Com. 226.

colour of title, and then rifling the house, was ruled to be within the statute against breaking the house, and stealing the goods therein. (l) So if a man go to a house under pretence of having a search warrant, or of being authorised to make a distress, and by these means obtain admittance, it is, if done in the night-time, a sufficient breaking and entering, to constitute burglary, or, if done in the day-time, house-breaking. (m)

If admission to a house be gained by fraud, not carried on under the cloak of legal process, as by a pretence of business, it will also amount to a breaking by the construction of law. Accordingly it was adjudged, that where thieves came to a house in the night-time, with intent to commit a robbery, and knocked at the door, pretending to have business with the owner, and, being by such means let in, robbed him, they were guilty of burglary. (n) And so where some persons took lodgings in a house, and afterwards, at night, while the people were at prayers, robbed them: it was considered, that the entrance into the house being gained by fraud, with an intent to rob, the offence was burglary. (o) For the law will not endure to have its justice defrauded by such evasions. (p)

A case is also reported, where the entrance to the house was gained by deluding a boy who had the care of it. It appeared upon the evidence, that the prisoner was acquainted with the house, and knew that the family were in the country; and that upon meeting with the boy who kept the key, she desired him to go with her to the house; and, by way of inducement, promised him a pot of ale. The boy accordingly went with her, opened the door, and let her in; upon which she sent him for the pot of ale, and, when he was gone, robbed the house, and went away. And this being *in the night time*, it was adjudged that the prisoner was clearly guilty of burglary. (q)

The breaking may also be by conspiracy. Thus where a servant conspired with a thief to let him into his master's house to commit a robbery, and in consequence of such agreement, opened the door or window in the night time, and let him in; this, according to the better opinion, was considered to be burglary in both the thief and the servant. (r) And this doctrine is confirmed by a subsequent decision. Two men were indicted for burglary; and, upon the evidence, it appeared, that one of them was a servant in the house where the offence was committed; that in the night time he opened the street door, let in the other prisoner, and

(l) Farre's case, Kel. 43.

(m) *Per Cur.* in Gascoigne's case, 1 Leach 284.

(n) *Le Mott's case*, Kel. 42. 1 Hawk. P. C. c. 38. s. 8.

(o) *Casey and Cotter*, (case of) Kel. 62, 63. 1 Hawk. P. C. c. 38. s. 9. referred to by the court; in giving judgment in *Semple's case*, 1 Leach 424.

(p) 1 Hawk. P. C. c. 38. s. 9. 4 Black. Com. 227. 2 East. P. C. c. 15. s. 2. p. 485.

(q) *Rex v. Hawkins*, O. B. 1704.

1 East. P. C. c. 15. s. 2. p. 485, cited from MS. Tracy 80. and MS. Sum.

(r) 1 Hale 553. 1 Hawk. P. C. c. 38. s. 14. 4 Black. Com. 227. In Dalt. c. 99. p. 259. (later ed. p. 487.) it is supposed only to be larceny in the servant; but, Lord Hale says, it seems to be burglary in both, for if it be burglary in the thief, it must needs be so in the servant, because he is present and aiding the thief to commit a burglary.

shewed him the side-board, from whence the other prisoner took the plate; that he then opened the door, and let the other prisoner out; did not go out with him, but went to bed. And upon these facts being found specially, all the judges were of opinion, that both the prisoners were guilty of burglary; and they were accordingly executed. (s)

By servants.

It may be here mentioned, that in the case of a servant opening a door of his master's house for a felonious purpose, without any plan or conspiracy with other persons to commit a robbery, it seems to have been considered, that the question whether such act will amount to a breaking must depend upon the point, whether the door might have been opened by the servant in the course of his trust and employment. Thus, it is said, that if a servant unlatch a door, or turn a key in a door of his master's house, and steal property out of the room; such opening of the door, being within his trust, is not a breaking: but that if a servant break open a door, whether outward or inward, (as a closet, study, or counting house,) and steal goods, such opening, not being within his trust, will amount to a breaking of the house, either within the statutes relating to the breaking of dwelling houses in the day time, or within the law of burglary. (t)

Of the entering necessary to constitute a burglary.

With respect to the entering necessary to constitute burglary; it is agreed, that any, the least, entry either with the whole or any part of the body, hand, or foot, or with any instrument or weapon, introduced for the purpose of committing a felony, will be sufficient. (u) Thus, where the prisoner, in the night time, cut a hole in the window shutters of the prosecutor's shop, which was part of the dwelling-house, and putting his hand through the hole, took out watches and other things, which hung in the shop, within his reach, it was holden to be burglary. (x) So, if a thief breaks the window of a house in the night time, with an intent to steal, and puts in a hook or other engine, to reach out goods; or puts a pistol in at the window with intent to kill; this is burglary, though his hand be not within the window. (y) And, in a case where thieves came in the night to rob A., who perceiving it opened his door, issued out, and struck one of the thieves with a staff, when another of them, having a pistol in his hand, and perceiving persons in the entry ready to interrupt them, put his pistol within the door, over the threshold, and shot, in such manner that his hand was over the threshold, but neither his foot nor any other part of his body, it was adjudged burglary by great advice. (z)

Discharging a gun, &c. on the outside of the house.

Though it is admitted that a person putting a pistol in at a window with intent to kill, thereby makes a sufficient entry, to constitute a burglary, yet it has been questioned whether if he should shoot *without* the window, and the bullet come in, the en-

(s) Cornwall's case, 2 Str. 881. 1 Hawk. P. C. c. 38. s. 14. 19 St. Tri. (Howel) 782 in the note.

(t) 2 Hale 354, 355.

(u) 3 Inst. 64. 1 Hale 555. Sum. 80. 1 Hawk. P. C. c. 38. s. 11, 12, 1 And. 115. Lamb. c. 7. p. 263. Fost.

108. 4 Black. Com, 227. 1 Bacon. Ab. Burgl. (B).

(x) Gibbons's case, Fost. 107, 108.

(y) 3 Inst. 64. 1 Hale 555. Sum. 80.

(z) 1 Hale 553. Crompt. 32 (a) 2 East. P. C. c. 15. s. 7. p. 490.

try would be sufficient. (a) It is, however, elsewhere laid down, that to discharge a loaded gun into a house is a sufficient entry. (b) And a learned writer has observed, that it seems difficult to make a distinction between this kind of implied entry, and that which is effected by means of an instrument introduced within the window or threshold, for the purpose of committing a felony; unless it be that the one instrument by which the entry is effected is holden in the hand, and the other discharged from it: but that no such distinction is any where laid down in terms. (c)

It appears, however, that the mere introduction of an instrument, in the act of breaking the house, will not make a sufficient entry; but that the instrument by which the entry is effected must be introduced for the purpose of committing a felony. So that where a thief broke a hole in a house, intending to rob the owner, but had not otherwise entered, when the owner for fear threw out his money to him, and he went off with it; the better opinion appears to have been, that it was not burglary. (d) In another case it appeared in evidence that the prisoners had bored a hole with an instrument called a *centre-bit* through the pannel of a house door, near to one of the bolts by which it was fastened; and that some pieces of the broken pannel were found within the threshold of the door; but it did not appear, that any instrument except the point of the *centre-bit*, or that any part of the bodies of the prisoners had been within the house, or that the aperture made was large enough to admit a man's hand: and the court held this not to be a sufficient entry. (e)

Introduction of an instrument, in the act of breaking the house.

Where a glass window was broken, and the window opened with the hand, but the shutters in the *inside* were not broken, it was ruled to be burglary, but considered as going to the extremity of the law. (f) In a more recent case however, it was decided that introducing the hand between the glass of an outer window, and an inner shutter, is a sufficient entry to constitute burglary, on the ground that as the glass of the window is the outer fence, whatever is within the glass is within the house. The facts were, that a sash window was fastened in the usual way by a latch from the bottom of the upper sash to the top of the lower one, and there were inside shutters fastened within: the prisoner broke a pane in the upper sash and introduced his hand within the window

(a) 1 Hale 555, where it is said that this seems to be no entry, to make a burglary: but a *guare* is added. And see 1 Anders. 115.

(b) 1 Hawk. P. C. c. 38. s. 11.; and it appears to have been ruled by Lord Ellenborough, C. J. that a person discharging a gun from the outside of a field, into it, so as that the shot must have struck the soil, was guilty of breaking and entering the field. See *Pickering v. Rudd*, 4 Campb. 220. 1 Stark. R. 58.

(c) 1 East. P. C. c. 15. s. 7. p. 490.

(d) 1 Hale 555, *ante* 8. note (g)

(e) *Rex v. Hughes and others*, O. B. 1785. 1 Leach 408. 1 Hawk. P. C. c. 38. s. 12. 2 East. P. C. c. 15. s. 7. p. 491.

(f) *Roberts's alias Chambers's case*, O. B. 1702. 1 East. P. C. c. 15. s. 3. p. 487. It was so ruled by Ward, Ch. B. Powis and Tracy, Js., and the Recorder; and they thought this the extremity of the law: and, on a subsequent conference with the other Judges, Holt, C. J. and Powell, J. doubting, and inclining to another opinion, no judgment was given.

to undo the latch, but whilst he was cutting a hole in the shutter with a centre-bit, and before he had undone the latch of the window, he was seized. The point saved for the consideration of the judges was, whether the introduction of the hand between the window and the shutter to undo the window latch, was a sufficient entry, and the judges present held that it was. (*g*) And in a more recent case where in breaking a window in order to steal something in the house, the prisoner's finger went within the house, the judges held that there was a sufficient entry to constitute burglary. The prisoner was instantly apprehended before he could put in his hand to steal any thing. (*h*)

Entry need not be made the same night as the breaking.

A breaking and entering by one, will be the act of the whole party engaged in the transaction.

The entry need not be made on the same night as the breaking, though both must be done in the night time: (*i*) but this point will be more properly mentioned in treating of the time at which the offence may be committed.

The doctrine which has been laid down, respecting principals in the second degree, and aiders and abettors, in a former part of this work, will apply to the case of burglary; and make the breaking and entering by one the act of all the party engaged in the transaction, and legally present while the fact is committed. (*k*) So that if A., B., and C., go upon a common purpose and design to commit a burglary in the house of D., and A. only actually break and enter the house, B. stand near the door but do not enter, and C. stand at the lane's end, orchard gate, &c. to watch, this will be burglary in them all; and they are all in law principals. (*l*)

Entry and stealing effected by means of an infant.

Neither will the offence be the less the act of the party from his having effected the entry and the stealing by means of an infant under the age of discretion. Thus, if A., a man of full age, take a child of seven or eight years old, well instructed by him in the villanous art, as some such there are; and the child goes in at the window, takes goods out, and delivers them to A., who carries them away, this is burglary in A., though the child who made the entry, be not guilty, by reason of his infancy. (*m*)

Of the mansion-house.

II. The breaking and entering, which have been thus described, must take place in a *mansion*, or *dwelling-house*; which latter term is now generally adopted in indictments for burglary. And in treating of such mansion, or dwelling-house, it will be proper to enquire, first, as to what shall be so considered; secondly, how far it must be inhabited; and, thirdly, as to the person to be deemed the owner of it; for the ownership must be correctly stated in the indictment.

What shall be considered a mansion-house.

Every house for the dwelling and habitation of man is taken to be a mansion-house in which burglary may be committed. (*n*) And a portion only of a building may come under this description. Thus where, upon an indictment for burglary, it appeared that the

(*g*) *Rex v. Bailey*, Hil. T. 1818, MS. Bayley, J., and Russ. & Ry. 341. Two of the judges, Lord Ellenborough, C. J., and Garrow, B., had some little doubt. The judges absent were Gibbs, C. J., Bayley, J., and Dallas, J.

(*h*) *Rex v. John Davis*, Hil. T. 1823,

Russ. & Ry. 499.

(*i*) 1 Hale 551. 4 Black. Com. 226.

(*k*) *Ante* Vol. I. 22. *et sequ.*

(*l*) 1 Hale 555.

(*m*) 1 Hale 555, 556.

(*n*) 3 Inst. 64.

prosecutor rented only certain rooms of a house, namely, a shop and parlour, in which the burglary was committed, but that the owner did not inhabit any part of the house, and only occupied the cellar, it was holden that the shop and parlour were to be considered as the mansion-house of the prosecutor. (o) And sets of chambers, in a college, or an inn of court, are to all purposes considered as distinct dwelling-houses; being often held under distinct titles, and, in their nature and manner of occupation, as unconnected with each other, as if they were under separate roofs. (p) A loft, situated over a coach-house and stables, in a public mews, and converted into lodging rooms, has also been holden to be a dwelling-house. It appeared that the prosecutor, who was coachman to a lady, rented the rooms at a yearly rent; but that he had never paid any rent; and that the rooms were not rated in the parish books as dwelling-houses, but as appurtenances to the coach-house and stables: that the way to the coach-house and stables was down a passage, out of the public mews, to a staircase which led to these rooms, and the entrance to which staircase was through a door, which was never fastened, but that there was a door at the top of the staircase to the rooms which was locked at night, and was broken by the prisoner. It was contended, on behalf of the prisoner, that these rooms, which probably were originally intended as mere hay-lofts, did not, in contemplation of law, form such mansions, or dwelling-houses, as to become the subject of burglary: but the objection was overruled by the court, who thought that the circumstance of these rooms being situated over the coach-house and stables would not alter the nature of the case; and that they were to all intents and purposes the habitation and domicile of the prosecutor and his family. (q) Burglary, however, cannot be committed by breaking into any inclosed ground, or any booth, or tent, erected in a market, or fair, though the owner may lodge therein; for the law regards thus highly, nothing but permanent edifices; and the lodging of the owner in so frail a tenement no more makes it burglary to break it open than it would be to uncover a tilted waggon, in the same circumstances. (r)

The mansion or dwelling-house, in which burglary might be committed, was held formerly to include the outhouses, such as warehouses, barns, stables, cowhouses, or dairy-houses, though not under the same roof, or joining contiguous to the dwelling-

Not buildings within the curtilage, unless there be a communication.

(o) Rogers's case, 1 Leach 89, 428. 2 East. P. C. c. 15. s. 19. The points respecting different mansions in the same house will be considered presently, in treating of the *ownership* of the mansion-house.

(p) 1 Hale 522, 556. 1 Hawk. P. C. c. 38. s. 18. Evans and Fynche (case of). Cro. Car. 473. 4 Black. Com. 252. 2 East. P. C. c. 15. s. 17. p. 505.

(q) Turner's case, O. B. 1784, *cor.* Gould and Buller, Jr.; and Perryn, B. 1 Leach 305. 2 East. P. C. c. 15, s. 9.

p. 492. Mr. J. Buller did not give any opinion; but said he would save the case for the opinion of the judges, who afterwards considered of the case, and were of opinion that this was a dwelling-house; and the prisoner, who had been acquitted of breaking and entering in the night time, had judgment for stealing to the value of forty shillings out of the dwelling-house.

(r) 1 Hale 557. 1 Hawk. P. C. c. 38. s. 35. 4 Black. Com. 226.

7 & 8 G. 4. c.
29. s. 13.

A part of a house may be so severed from the rest as no longer to be a place in which burglary can be committed.

house, provided they were *parcel* thereof. (s) And any outhouse, within the *curtilage*, or same common fence, as the mansion itself, was considered to be parcel of the mansion, upon the ground that the capital house protected and privileged all its branches and appurtenants, if within the curtilage, or homestall. (t) But the late statute 7 & 8 Geo. 4. c. 29. s. 13. has made an important alteration in this respect. It enacts "that no building, although " within the same curtilage with the dwelling-house, and occupied " therewith, shall be deemed to be part of such dwelling-house for " the purpose of burglary, unless there shall be a communication " between such building and dwelling-house, either immediate, or " by means of a covered and enclosed passage leading from the " one to the other." But the breaking and entering any building within the curtilage of a dwelling-house, and stealing therein, is subjected to a higher punishment than simple felony by another section of the same statute which will be more particularly mentioned in a subsequent chapter. (u)

In some cases, a part of a mansion-house may be so severed from the rest, by being let to a tenant, as to be no longer a place in which burglary can be committed. Thus, though a shop may be, and usually is, a parcel of the dwelling-house to which it is attached; yet if the owner of the dwelling-house let the shop to a tenant who occupies it by means of a different entrance from that belonging to the dwelling-house, and carries on his business in it, but never sleeps there, it is not a place in which burglary can be committed, if there be no internal communication with the other part of the house; for it is not parcel of the dwelling-house of the owner, who occupies the other part, being so severed by lease; nor is it the dwelling-house of the lessee, when neither he nor any of his family ever sleep there. (x) But if there be an internal communication, burglary it seems may be committed. Thus, where a man let part of his house, including a shop, to his son, and there was a distinct entrance into the part so let, but a passage from the son's part led to the father's cellars, and they were open to the father's part of the house, and the son never slept in the part so let to him, it was held upon a case reserved after a conviction for burglary in the shop, laid to be the dwelling-house of the father, that the conviction was right, upon the ground that the part of the house let to the son continued to be part of the dwelling-house of the father, by reason of the internal communication. (y) If the lessee, or his servant, should usually, or often lodge at night in a shop or other premises severed from the house, it would then be the mansion or dwelling-house of such lessee, in which burglary might be committed. (z)

A case was put upon the old law of burglary, whether if the

(s) 3 Inst. 64. 1 Hale 558. Sum. 82. 1 Hawk. P. C. c. 38. s. 21. 4 Black. Com. 225.

(t) 1 Hale 558, 9. 1 Hawk. P. C. c. 38. s. 25. 4 Black. Com. 225. 2 East. P. C. c. 15. s. 10. p. 493.

(u) Post, Chap. 5.

(x) 1 Hale 557, 558. Kel. 83, 84.

4 Black Com. 225, 226. 2 East P. C. c. 15. s. 20. p. 507.

(y) Rex v. Sefton, Mich. T. 1811. MS. Bayley J., and Russ. & Ry. 202. where it is said that the judges thought this a case of much nicety.

(z) 1 Hale 558.

owner and occupier of a dwelling-house should let a part of it, namely, a chamber and a cellar, to a tenant, the only passage to the cellar being out of the street, and the cellar should be broken open in the night, it would be burglary: and it was supposed that it would not, on the ground that the cellar must be considered as severed by the lease, and had no communication with the rest of the house. (a) Upon this, however, it was observed, that the cellar would be no more severed from the house by the lease than the chamber, in which a burglary might be committed, and laid to be in the mansion of the owner and occupier of the dwelling-house, there being but one common entrance to him and the lodger. But it was admitted, that if the cellar alone were let, clearly no burglary could be committed in it. (b) And it should seem that no burglary could now be committed in such cellar, whether it were let alone or together with the chamber, as the late act requires that there should be a *communication* between any building broken into and the dwelling-house, in order to constitute burglary.

A building separated from the dwelling-house by a public road, was holden not to be parcel of the dwelling-house; though the road was very narrow, and the dwelling-house and building were held by the same tenure, and some of the offices necessary to the dwelling-house adjoined to such building, and though there was an awning which extended to it from the dwelling-house; but they were not connected by any common fence or roof. But it was also holden that if such building were made a sleeping place for any of the servants of the dwelling-house, it might be deemed a distinct dwelling-house. J. B. lived in Epsom, and his kitchen, larder, brewhouse, and wash-house, were across a public passage nine feet wide; he had an awning over this passage to protect what was brought across; one of his servants, a boy, slept over the brewhouse, and that was the sleeping place allotted him by J. B. The boy's room was broken into, and Park J. doubting whether that could be deemed parcel of J. B.'s dwelling-house saved the point. Upon consultation, the great majority of the judges thought that it was not parcel of the dwelling-house in which J. B. dwelt, because it did not adjoin to it, was not under the same common roof, and had no common fence. Graham B. thought it was parcel of that house; but all the judges except Park J. (Richardson J. being absent) thought that it was a distinct dwelling-house of J. B.'s, and that as the indictment described it as his dwelling-house, the conviction was right. (c)

Part of premises considered as a distinct dwelling-house.

It should seem that if an out-house have a communication with a dwelling-house such as is described by the 7. & 8. Geo. 4. c. 29. s. 13. it will not be prevented from being parcel of the dwelling-house by being holden under a distinct title. It was said indeed, that if a man should take a lease of a dwelling-house from A. and of a barn from B., such barn would be no parcel of the dwelling-house, and not therefore a place in which burglary could be com-

It seems that an out-house will not be prevented from being parcel of the dwelling-house by being holden under a distinct title.

(a) Kel. 83, 84.

(b) 2 East P. C. c. 15. s. 20. p. 507.
And see *Rex v. Gibson, Mutton*, and

Wiggs, 1 Leach 357. 2 East. 508.

(c) *Rex v. Westwood*, Mich. T. 1892. Russ. & Ry. 495.

mitted; (d) a position which would seem to lead to the inference, that no outhouse, holden under a distinct title from the dwelling-house, could be the subject of burglary. But upon this, it was observed, that the circumstance of an out-building being enjoyed by the occupier under a different title from his dwelling-house, seemed a very unsatisfactory reason of itself for excluding it from the same protection, if it were within the curtilage, or under the same roof, and actually enjoyed as parcel of the dwelling-house in point of fact, and under such circumstances as would, apart from the difference of title, constitute it parcel of the mansion in point of law. (e)

Of the inhabi-
tancy.

The next question relating to the mansion-house is, how far it must be *inhabited*?

Cases where
the owner has
not begun to
inhabit.

It appears to be well settled, that unless the owner has taken possession of the house by inhabiting it personally, or by some one of his family, it will not have become his dwelling-house in the proper meaning of the word, as applied to the offence of burglary. There are several cases to this effect, which sufficiently overrule any different opinions which may have been formerly entertained. (f)

Case of Lyons
and Miller.

A Mr. Smith having purchased a house with an intention to reside in it, had moved into it some of his furniture and effects, to the value of about ten pounds; the house was put under the care of a carpenter for the purpose of being repaired; and Mr. Smith had not himself entered into the occupation of any part of it, nor did any part of his family, nor any person whatever, sleep therein. While the house was in this situation, it was broken open in the night-time; and, upon a case reserved for the consideration of the judges, they were of opinion that it could not be considered as a dwelling-house, being entirely uninhabited; and that therefore there could be no burglary. (g)

Hallard's
case.

So where the tenant of a house, when the former tenant had quitted, put all his furniture into it, and frequently went thither in the day-time, but neither himself, nor any of his family had ever slept there; it was ruled that burglary could not be committed therein. (h)

(d) 1 Hale 559.

(e) 2 East P. C. c. 15. s. 10. p. 494.

(f) In 1 Hawk. P. C. 38. s. 18. it is said that a house which one has hired to live in and brought part of his goods into, but has not yet lodged in, is one in which burglary may be committed. The point is mentioned in Kel. 46. but not as having been decided, *ideo quære legem* being subjoined.

(g) Rex v. Lyons and Miller, 1 Leach 185. The case is rather differently reported in 2 East. P. C. c. 15. s. 11. p. 496. where it is stated that no goods were in the house at the time it was broken open, and that the judges were therefore also of opinion that it was no burglary, because, as the indictment charged an intent

to steal, it must mean to steal the goods then and there being, and that, nothing being in the house, nothing could be stolen: but it is also further stated, that it seemed to be the sense of the judges, and Eyre, B. declared it to be his opinion, that although some goods might have been put into the house, yet if neither the party nor any of his family had inhabited it, it would not be a mansion-house in which burglary could be committed.

(h) Hallard's case, *cor.* Buller, J., *Exeter*, Spr. Assiz. 1796. 2 East. P. C. c. 15. s. 12. p. 498. 2 Leach 701. note (a), and S. P. Thompson's case, *cor.* Grose, J. *Kingston*, Spr. Ass. 1796, 2 East. *ibid.* 2 Leach 771.

And though persons sleep in a house thus situated, yet, if they are not of the family of the owner, it will still not be a dwelling-house in which burglary can be committed.

Thus, where the prisoner was indicted for a burglary in the dwelling-house of a Mr. Holland, and it appeared in evidence that the house was newly built and finished in every respect except the painting, glazing, and the flooring of one garret; that a workman, who was constantly employed by Mr. Holland, slept in it for the purpose of protecting it, but that no part of Mr. Holland's domestic family had taken possession of it; the court held that it was not the dwelling-house of Mr. Holland. (e)

Fuller's case.

So in a case where it appeared that the prosecutor had lately taken the house which was broken open; that he himself had never slept there, nor any of his family; but that on the night in which it was so broken, and for six nights before, he had procured two hair-dressers, who were not in any situation of servitude to him, to sleep there for the purpose of taking care of his goods and merchandize, which were deposited therein; the court was of opinion that the house could not, in contemplation of law, be considered as the dwelling-house of the prosecutor. (f)

Harris's case.

Where the owner of the house has no intention of going to reside in it himself, and merely puts some person to sleep there at nights till he can get a tenant, the same rule is established; and the house, under such circumstances, cannot be considered as the dwelling-house of the owner.

Where the owner puts a person to sleep in the house at nights, till he can get a tenant.

This point arose upon an indictment for stealing goods to the value of forty shillings in the *dwelling-house*. (g) Upon the evidence it appeared that Mr. Pearce was a brewer living in Millbank-street, and owner of a public-house in Palace-yard, in which the offence was committed. The house was, at the time of the offence, shut up, and in the day time entirely uninhabited: but a servant of Mr. Pearce's was put to sleep in it at night, for the protection of the goods, until some other publican should take possession of it. There were in the house a number of beds, chairs, and other articles of furniture, which Mr. Pearce had purchased of the former tenant, with a view to accommodate the person to whom he might let it, but with no intention of residing in the house himself, either personally, or by means of any of his servants. The prisoner was found guilty of the whole charge stated in the indictment: but the point being saved for the opinion of the Judges, they were of opinion that the conviction, as to the capital part of it, was wrong; that as Mr. Pearce never intended to inhabit the house, it could not, in contemplation of law, be considered as his dwelling-house; and that it would have been no burglary if the house had been broken in the night. (h)

Davies's case.

(e) Fuller's case, O. B. 1782, *cor.* P. C. c. 15. s. 12. p. 498.
the Recorder, 2 East. P. C. c. 15. s.

12. p. 498. 1 Leach 187.

(g) Under the provisions of 12 Anne, c. 7.

(f) Harris's case, O. B. 1795, *cor.*

the Recorder, 2 Leach 701. 2 East. Leach 876. 2 East. P. C. c. 15. s. 12.

Using the house for business, &c. but not sleeping there.

Where the owner of the house has never, by himself or by any of his family slept in it, though he has used it for his meals, and all the purposes of his business, it is not his dwelling-house, so as to make the breaking thereof burglary. One Clayson took a house in a street, and in it carried on his business of a shop-keeper, and dined, entertained his friends, and passed his days there, and had bedding up stairs; but he always slept at his mother's two doors off, and he had no servant sleeping in the house. An indictment for burglary described this as his dwelling-house, and the prisoner was convicted; but the Judges held that it could not be deemed his dwelling-house, and that the conviction was wrong. (i)

A house will not cease to be the dwelling-house of its owner, on account of his occasional or temporary absence.

When the owner of the house has once entered upon the possession and occupation of it, by himself, or by some of his family, it will not cease to be his dwelling-house on account of any occasional or temporary absence; even though no person be left in it. (k) Thus, if A. have a dwelling-house, and upon occasion he and all his family be absent for a night or more, burglary may be committed in their absence; and, so if A. have two mansion-houses, and be sometimes with his family at one, and sometimes at the other, the breach of one of them in the night time, in the absence of his family, will be burglary. (l) Also, if A. have a chamber in a college, or inn of court, where he usually lodges in term time; and, in his absence in the vacation, the chamber be broken open, the same rule will apply. (m)

Case of Murray and Harris.

The following case was decided in conformity with these principles. The owner of a house in Westminster, in which he dwelt, took a journey into Cornwall, with intent to return; and sent his wife and family out of town, and left the key with a friend to look after the house; and, after he had been gone a month, no person being in the house, it was broken open in the night, and robbed. A month afterwards, the owner returned with his family, and again inhabited there. This breaking was holden to be burglary. (n)

But there must be *animus revertendi* in the owner.

But in cases of this kind there must be an intention on the part of the owner to return to his house, *animus revertendi*; for if the owner has quitted without any intention of returning, the breaking of a house so left will not be burglary. (o)

Nutbrown's case.

The prisoners were indicted for a burglary in the dwelling-house of a Mr. Fakney, and stealing divers goods. It appeared by Mr. Fakney's evidence, that he made use of the house in question, which was situated at Hackney, as a country-house, in the summer time, his chief residence being in London: that, about

p. 499. The prisoner was in consequence recommended to mercy, on condition of transportation, which might have been his punishment if he had been found guilty of simple larceny only.

(i) *Rex v. Martin*, East. T. 1806. MS. Bayley, J.; and Russ. & Ry. 108.

(k) *Fost. 77. 1 Hale 556. 3 Inst.*

64. 1 Bac. Ab. *Burglary*, (E.)

(l) 1 Hale 556. Sum. 82.

(m) *Id ibid.*

(n) *Rex v. Murray and Harris*, O. B. 10 W. 3. 2 East. P. C. c. 15. s. 11. p. 496, cited also in *Fost. 77.* from MS. Denton and Chapple, as a case upon a burglary in the house of Mr. Nicholls.

(o) *Fost. 77. 4 Black. Com. 225.*

the end of the summer before the offence was committed, he removed with his whole family to London, and brought away a considerable part of his goods; and that in the November following his house was broken open, and in part rifled; upon which he removed the remainder of his household furniture, except a clock, and a few old bedsteads, and some lumber of very little value; leaving no bed or kitchen furniture, nor any thing else for the accommodation of a family. Being asked whether, at the time he so disfurnished his house, he had any intention of returning to reside there, he declared that he had not come to any settled resolution, whether to return or not; but was rather inclined totally to quit the house, and to let it for the remainder of his term. The facts charged were sufficiently proved against the prisoners; but the court were of opinion that the prosecutor having left his house, and disfurnished it in the manner before mentioned, without any settled resolution of returning, but rather inclining to the contrary, the house could not, under these circumstances, be deemed his dwelling-house at the time the fact was committed; and accordingly directed the jury to acquit the prisoners of the burglary: which they did, but found them guilty of felony, in stealing the clock, &c. (p)

So, if a man leaves his house without any intent of living in it again, and means to use it as a warehouse only, and has persons, not of his family, to sleep in it to guard the property, the house cannot be described as his dwelling-house. One Cox lived in St. Martin's-lane, but removed to the Haymarket, and kept the house in St. Martin's-lane as a warehouse only; none of his family or servants remained there, but two women who worked for him in his business slept there to guard the property; the prisoner stole to the amount of above forty-shillings in the house, and was convicted upon an indictment against him describing the house as the dwelling-house of Cox; but upon a case reserved, the Judges held, that the conviction was wrong. (q) But though a man leave his house, and never mean to live in it again, yet if he uses part of it as a shop, and lets a servant and his family live and sleep in another part of it for fear the place should be robbed, and lets the rest to lodgers, the habitation by the servant and his family is a habitation by the owner, and the shop will still be considered part of his dwelling-house. The indictment was for burglary in the dwelling-house of Bendall, the place broken into was a shop. parcel of a dwelling-house, which he had inhabited. He had left the dwelling-house, and never meant to live in it again, but retained the shop, and let the other rooms to lodgers: after some time he had put a servant and his family into two of the rooms, lest the place should be robbed, and they lived there. Upon a case reserved, the Judges thought putting in a servant and family to live, very different from putting them in merely to sleep, and that this was still to be deemed Bendall's house, and that the conviction was right. (r)

House used as
a warehouse.

House inhabited
by a servant
and his
family.

It seems that the mere casual use of a tenement as a lodging,

Inhabitaney,
merely casual,

(p) Nuthbrown's (John and Miles) 1810. Russ. & Ry. 187.
case, Post. 76, 77.

(r) Rex v. Gibbons, East. T. 1821.

(q) Rex v. Flannegan, Mich. T. MS. Bayley, J

or for some particular purpose, will not be sufficient.

or the using it only upon some particular occasions, will not be such an inhabitancy as will constitute it a dwelling-house in which burglary can be committed. (s) Thus, it was agreed by all the judges, that the fact of a servant having slept in a barn, on the night in which it was broken open, and for several nights before, he being put there for the purpose of watching thieves, made no sort of difference in the question, whether the offence was burglary or not. (t) And the circumstance of a porter lying in a warehouse, *to watch goods*, which is only for a particular purpose, does not make it a dwelling-house. (u) The question, therefore, respecting burglary in such barn or warehouse will remain just as if no person had slept in them, to be disposed of by the principles which have been before discussed, as to their being or not being *parcel* of the mansion or dwelling-house. (x)

Qu. as to the case of an executor putting servants into the house of his testator, but not going to live there himself.

A point of some nicety arises in the case of an executor putting servants into the house of his testator, but not going to live there himself. A case of this kind occurred, which is thus stated. A. died in his house, and B. his executor put servants into it, who lodged in it, and were on board wages; but B. never lodged there himself: and upon an indictment for burglary, the question was, whether this might be called the mansion-house of B. The court *inclined* to think it might, *because the servants lived there*. (y) It was not necessary to decide the point in that case, as it turned out on the evidence that there was not a sufficient breaking of the house; and perhaps it would be difficult to reconcile the opinion to which the court is said to have inclined with some of the decided cases and principles upon this subject if the facts were that the executor did not contemplate any occupation of the house by himself, and that he merely put the servants there for the purpose of taking care of the house and furniture, till they should be properly disposed of according to his trust. (z)

Of the ownership of the mansion-house.

It remains further, in treating of the mansion or dwelling-house, to enquire as to the person who is to be deemed the *owner* of it, in order to be able to state correctly in the indictment the name of the party in whose dwelling-house the burglary is alleged to have been committed.

This subject is rather of a complicated nature: but, from the cases which have been hitherto decided, it seems that the material point to be ascertained will be, whether the ownership remains with the proper owner of the dwelling-house, and is exercised by him, either by his own occupation, or by that of other persons on his account, or whether the proper owner has given such an interest to other persons, in the whole or in parts of the dwelling-house, as to constitute an ownership in such other persons.

Ownership, where the occupation is by

The owner of a dwelling-house may exercise his ownership by his own personal occupation, or by the occupation of any persons

(s) 2 East. P. C. c. 15. s. 11. p. 497.

(t) Brown's case, 2 East. P. C. c. 15. s. 11. p. 497. and s. 14. p. 502.

(u) Smith's case, M. 3 G. 1. by ten of the Judges cited from Lord King's MS. 96. and Serjeant Foster's MS. in 2 East. P. C. c. 15. s. 11. p. 497.

(x) *Ante*, 13, *et sequ.*

(y) Jones and Longman (case of) O. B. 1689, from Chapple's MS. 2 MS. Sum. 305, cited in 2 East. P. C. c. 15. s. 12. p. 499.

(z) See Davies's case, *ante*, 17.

who by law are deemed to be part of his family. This doctrine has been carried to a great extent in the case of a wife. For where it appeared that a lady, whose house was robbed, had for many years lived separate from her husband; and that, when she was about to take the house, a lease of it was prepared in her husband's name, but that he refused to execute, and said he would have nothing to do with it, in consequence of which she agreed with the landlord herself, and had constantly paid the rent; it was holden upon an indictment for breaking open the house that it was well laid as the dwelling-house of the husband. (a) So where a married woman lived apart from her husband, upon an income arising from property vested in trustees for her separate use, it was held, that a house which she had hired to live in might be described as her husband's dwelling-house, though she paid the rent out of her separate property, and the husband had never been in it. The indictment described the dwelling-house first as the house of J. S., and secondly as the house of his wife. It appeared that they lived apart, and that the wife subsisted upon property which had been hers before marriage, and which was vested in trustees for her separate use; that the house was no part of the settled property, but was hired by the wife who paid the rent for it, and the husband had never been in it. Upon a case reserved, the Judges were clear that this was to be deemed in law the dwelling-house of the husband: it was the dwelling-house of some one: it was not that of the trustees, for they had nothing to do with it, it was not the wife's, because, at law, she could have no property; it could then only be the husband's. (b) In a later case it was held, that the house of a husband in which he allowed his wife to live separate from him might be described as the house of the husband, though the wife lived there in adultery with another man who paid the housekeeping expences; and though the husband suspected a criminal intercourse between his wife and the other man, when he allowed her to live separate. The indictment was for burglary in the dwelling-house of Gillings, who did not live there, but the house was his for a long term, and he suffered his wife to live there separate from him. He had agreed to the separation, and had given her up the house, because he suspected a criminal intercourse between her and one Websdale, and had allowed her also to take a bed, and what furniture she chose. She lived there with Websdale, who paid the housekeeping expences, but neither rent or taxes. Upon a case reserved, the Judges thought that this was properly described as the house of Gillings, and that the conviction was right. (c) But if a case should arise in which the law would adjudge the separate property of the mansion to be in the wife, she having also the exclusive possession, it should seem that in such case the burglary would properly be laid to be committed in her mansion-house, and not in that of her husband. (d)

persons who are part of the owner's family.

Wife living apart from her husband.

The owner of a dwelling-house may also occupy it by means of

Ownership, where the oc-

(a) Farre's case, Kel. 43, 44, 45.

(c) Rex v. Wilford and Nibbs, Trin.

(b) Rex v. French, Mich. T. 1822. T. 1823. Russ. & Ry. 517.

Russ. & Ry. 491.

(d) 2 East. P. C. c. 15. s. 16. p. 504.

cupation is by means of the servants of the owner.

Case of Stockton and Edwards. Where the servant of three partners in trade had weekly wages, and some rooms assigned to him for a lodging over the bank and brewery office of the partners, with which his lodging communicated by a trap-door and a ladder, it was holden that a burglary committed in the banking room was well laid as in the dwelling-house of the three partners.

servants. Thus, in a case which has been already mentioned, where the servant of a farmer, and his family, lived in a cottage adjoining his master's house, which he took to by agreement with his master, when he went into the service, but for which he paid no rent; only an abatement was made in his wages, on account of his family being to reside in the cottage; all the Judges (with the exception of Buller, J., who doubted) held that this was no more than a licence to the servant to lodge in the cottage, and not a letting of it to him; and that the cottage, therefore, continued part of the mansion-house of the farmer. (e)

A modern case appears to have proceeded upon the same principle. The prisoners were indicted for a burglary in the dwelling-house of Messrs. Moore, Harrison, and Hamilton; and being convicted, received sentence of death: but execution was respited, in order that the opinion of the judges might be taken upon the following facts. Messrs. Moore, Harrison, and Hamilton, the prosecutors, were partners in their business of bankers, and also in a brewery concern; and were the owners of the house in question. The lower rooms of the house were three in number, having only one entrance from without, by a door opening to the street; which was the door broken open to commit the felony. It opened into one of the three rooms in which the clerk's business relating to the brewery was transacted: that room communicated by a door-way with an inner room where the banking business was done, and where the cash, notes, &c. were deposited: and the inner room communicated in the same manner with a further room, which was the private room of the partners. And the business of Messrs. Moore and Co. was transacted only in these lower rooms of the house, in which no person slept. When the entrance door which opened to the street was locked up at night, upon leaving the offices, the clerk who had the custody of the key left it in the care of one John Stevenson, who inhabited the upper rooms of the house, from whom it was received again, when the offices were to be opened in the morning. This John Stevenson was a servant to Messrs. Moore and Co. in their brewery business, as their cooper, at weekly wages, with firing and lodging for himself and his family: but the contract as to the lodging was not, in general terms, that he should be provided with lodging, but that he should have the particular rooms which he inhabited for the lodging of himself and his family. There was a separate entrance to these rooms from without; they were not in any way used for the business which was carried on in the lower rooms, some papers only of no consequence being kept in them by Messrs. Moore and Co.; and the only communication between the upper rooms and the lower ones was by a trap-door in the floor of one of the upper rooms and a ladder. Since the robbery, this trap-door and ladder had been constantly used, in order to go down to the lower rooms and bolt the street door of the offices in the inside, for better security; but none of the witnesses knew of their having ever been used for any purpose previous to the robbery, although they might have been so used at any time, as the trap-

(e) Brown's case, *Newcastle Sum.* c. 15. s. 14. p. 501, 502. And see *Bertie Ass.* 1787, *cor.* Wilson, J., 2 East. P. C. v. Beaumont, 16 East. 33.

door was never kept locked or fastened, and the key of it was left in Stevenson's custody. There were six windows in the upper rooms which were assessed in the name of Stevenson; but the duty was paid by Messrs. Moore and Co. The lower rooms had nine windows, but were not charged with any window tax, the assessors not considering them as inhabited. Upon these facts, two questions were submitted: first, whether this inhabitancy could be considered as the inhabitancy of Messrs. Moore and Co. by their servant Stevenson, or whether Stevenson, by the contract, became tenant, and the upper part of the house was his dwelling-house, and not that of Messrs. Moore and Co.; and, secondly, if these premises were the dwelling-house of Messrs. Moore and Co., the further question arose, whether there was such a severance of the lower part as to prevent its being included as part of their dwelling-house.

After hearing the argument on behalf of the prisoners, Lord Ellenborough, C. J. said, "Could Stevenson have maintained trespass against his employers for entering these rooms? or if a man assigns to his coachman the rooms over his stable, does he thereby make him a tenant? Whether the assessors formed a right or a wrong judgment, can make no difference: nor is it material to which trade Stevenson was a servant, for the property in both partnerships belonged to the same persons. As to the severance, the key of the trap door was left with Stevenson, and the door was never fastened; and it can make no difference, whether the communication between the rooms was through a trap door, or by a common staircase." And Mansfield, C. J. also said, "Many persons have houses given them to live in, as porters at park-gates: if a master turns away his servant, does it follow that he cannot evict him till the end of the year? Could not the prosecutors have turned out this man when they would?" (f)

The same rule, of the occupation of the servant being that of the master, will hold with respect to all persons standing in the relation of servants, and not having the exclusive possession, nor paying rent. Therefore, apartments in the king's palaces, or in the houses of noblemen, for their stewards and chief servants, must be laid as the mansion-house of the king or nobleman. (g) Accordingly, where three persons were charged with having broken into the lodgings of *Sir H. Hungate*, at *Whitehall*, it was agreed that the indictment should be for breaking the *King's mansion*, called *Whitehall*. (h) So, where a man was indicted for breaking into a chamber in *Somerset-house*, and the indictment charged it

Ownership of apartments in palaces, noblemen's houses, or in the houses of a public company.

(f) *Rex v. Stockton and Edwards*, 2 Taunt. 339. 2 Leach 1015. The case was reserved by *Chambre, J.*, at *Carlisle*, and was considered in *Mich. T. 1810*. Eight of the judges thought that Stevenson was not tenant, but inhabited only in the course of his service. *Thomson, B.*, *Graham, B.*, *Lawrence, J.*, and *Chambre, J.*, *contra*. *S. C.* under the name of *Rex v. John*

Stock and another in *Russ. & Ry.* 185. The judges did not afterwards pronounce any further opinion; but the prisoners were executed according to their sentence.

(g) 1 Hale 556, 557. 2 East. P. C. c. 15. s. 14. p. 500.

(h) *Rex v. Williams and others*, 1 Hale 522.

to be the mansion-house of the person who lodged in it, it was agreed that the whole house belonged to the queen-mother, and therefore that the indictment was bad. (i) And where a house at *Chelsea* was broken into, which was used for an office under government, called the Invalid Office, and the rent and taxes of which were paid by government; it was holden that the indictment was defective in laying it to be the house of a person who occupied the whole of the upper part of it. (k) An indictment also for a burglary in the dwelling-house of the *East India Company* was holden to be good, the house being inhabited by the servants of that company. (l) And where an indictment charged a burglary in breaking into the mansion-house of the master, fellows, and scholars of Bennet College, in Cambridge; the fact being that the prisoner broke into the buttery of the college; all the judges, upon reference to them, held that it was burglary. (m)

Ann Hawkins's case.

The following case also appears to have proceeded upon the same principle, that burglary in the apartments of officers of a public company must be laid as committed in the mansion-house of the company. The prisoner was indicted for breaking the mansion-house of Samuel Story, in the night-time. It appeared on the evidence that the house belonged to the *African Company*; that Story was an officer of the company; that he and many other persons, as officers of the company, had separate apartments in the house, in which they inhabited and lodged; and that the apartment of Story was that which was broken open. It was holden that the apartment of Story could not be called his mansion-house, because he and the others inhabited the house merely as officers and servants of the company. (n)

Ownership in servants.

But the rule does not apply where a servant lives in a house of his master's at a yearly rent; and such house cannot be described as the master's house, though it be upon the premises where the master's business is carried on, and though the servant have it because of his services. Greaves and Co. had a house and buildings where they carried on their trade; Mettran, one of their servants, lived with his family in the house, and paid 11*l.* per ann. for rent and coals, such rent being much below the value; and Mettran was allowed to live there because he was servant; Greaves and Co. paying the rates and taxes. One of the buildings having been broken into, the indictment charged a burglary to have been committed in the dwelling-house of Greaves and Co., and it was urged that Mettran's occupation was their occupation, that the house he occupied might be deemed their dwelling-house, and that all their

(i) Burgess's case, Kel. 27.

(k) Peyton's case, O. B. 1784, 1 Leach 324. In 1 Bac. Abr. *Burg.* (E.), in the notes, there is a *Qu.* in whose house stealing in the Invalid Office at Chelsea should be laid to be.

(l) Pickett's case, O. B. 1765, 2 East. P. C. c. 15. s. 14. p. 501.

(m) Maynard's case, *Cambridge Spr.* Ass. 1774. 2 East. P. C. c. 15. s. 14. p. 501.

(n) Rex v. Hawkins, *cor.* Holt,

C. J., Tracy, J., and Bury, B., O. B. 1704, *Fost.* 38, 39. The case is cited from Mr. J. Tracy's MS. from which it appears that the jury was discharged of the indictment laying the breaking to be in the mansion-house of Samuel Story; and that it was amended by laying the breaking in the mansion-house of the company. Mr. J. Foster says that this report is warranted in the substantial parts of it by the record, *Fost.* 39.

buildings might be deemed part of their dwelling-house. But upon a case reserved, the judges thought that as Mettran stood in the character of tenant, and Greaves and Co. might have distrained upon him for the rent, and could not arbitrarily have removed him, Mettran's occupation could not be deemed their occupation, and that the conviction as to the burglary was wrong. (o) And though a servant live rent free for the purpose of his services in a house provided for that purpose, yet if he has the exclusive possession, and it is not parcel of any premises occupied by his master, the house may be described as the house of the servant: especially if it does not belong to his master, but to some person paramount his master; as in the case of the house of a toll collector. The tolls at a gate between Leeds and Wakefield were let to Ward, who employed Ellis to collect them, and Ellis lived for that purpose in a house belonging to the trustees, and built by them for that purpose: he had a weekly sum from Ward, and the family of Ellis lived with him in the house. A burglary having been committed in the house, it was described in the indictment as the house of Ellis: and upon a case reserved all the judges were unanimous that it was rightly described; for Ellis had exclusive possession, it was unconnected with any premises of Ward's, and Ward did not appear to have any interest in it. (p)

And the rule has been holden not to extend to the case of a house occupied by the *agent of a trading company*; though he resided in it, with his family, only for the purpose of conducting their trade, and the lease of the house was held and the rent and taxes for it paid by the company; and an indictment was holden to be good, which stated the burglary as being committed in the dwelling-house of such agent.

Ownership in the *agent* of a trading company.

In this case the agent, a Mr. Sylvester, kept a blanket warehouse in Goswell-street; and resided, together with his wife and children, in the house over the warehouse. The warehouse was on the ground floor, and consisted of four rooms, the second of which was the room that was broken into; and there was an internal door from the warehouse to the dwelling-house. All the blankets were the property of Mr. William Sellman and others, a company of blanket manufacturers, consisting of sixty or more, at Witney, in Oxfordshire, none of whom ever slept in the house. The lease of the premises was in the company, and the whole rent of both dwelling-house and warehouse was paid by them. Sylvester acted as their servant or agent, and received a consideration for his services from them, part of which consideration, he said, was his being permitted to live in the house rent free; and the lease of the premises was in the company. The commission of the offence being clearly proved, it was contended, by the counsel for the prisoners, on the authority of Hawkins's case, that this must be considered as the dwelling-house of the company, and ought to have been so charged in the indictment, and not as the house of Sylvester, who inhabited it merely for them, and as their servant. But the court is said to have been

Case of Margetts and others.

(o) *Rex v. Jarvis*, East. T. 1824, Mich. T. 1824, MS. Bayley, J., and MS. Bayley, J., and Ry. & Mood. C.C.7. Ry. & Mood. C. C. 42.

(p) *Rex v. Camfield* and another,

clearly of opinion that it was rightly charged to be the dwelling-house of Sylvester; and that although the lease of the house was held, and the whole rent paid by the company in the country, yet as they had never used it in any way as their habitation, it would be doing an equal violence to language and to common sense, to consider it as their dwelling-house, especially as it was evident, that their only purpose in holding it was to furnish a dwelling to their agent, and ware-rooms for the commodities therein deposited. That the dwelling so furnished was a mean by which they in part remunerated Sylvester for his agency, and precisely the same thing as if they had paid him as much more as the rent would amount to, and he had paid the rent; but that the company in this case preferred paying the rent of the whole premises, and giving their agent and his family a dwelling therein, towards the salary which he was to receive from them. And that the house was therefore essentially and truly the dwelling-house of the person by whom it was occupied. (g)

Ownership where a servant has part of a house, and the rest is reserved.

But where a servant has part of a house for his own occupation, and the rest is reserved by the proprietor for other purposes, the part reserved cannot be deemed part of the servant's dwelling-house: and it is the same if any other person has part of the house, and the rest is reserved. The governor of the Birmingham workhouse was appointed under contract for seven years, and was to have the chief part of a house for his own and his family's occupation, but the guardians and overseers who appointed him, reserved to themselves the use of one room for an office, and three others for store-rooms. The governor was assessed for the house, excepting these rooms. The office was broken open, and the indictment stated it to be the governor's dwelling-house: but after conviction, and a case reserved, the judges held the description wrong. (r)

Ownership of apartments occupied by

Where persons are abiding in a house as guests, or by sufferance, or otherwise, having no fixed or certain interest in any part.

(g) *Rex v. Margetts and others*, O. B. 1801, *cor.* Graham, B. and Grose, J., 2 Leach 930. It is also stated, in the report of this case, that the court further gave as a reason for their judgment, that "the punishment of burglary was intended to protect the *actual occupant* from the terror of disturbance during the hours of darkness and repose, but that it would be absurd to suppose that the terror, which is of the essence of this crime, could, from the breaking and entering in this case, have produced an effect at Witney, in Oxfordshire." But the accuracy of this reasoning may perhaps be questionable. The punishment of burglary will attach equally, and the actual occupant will not be less protected, though the offence should be laid in the dwelling-house of the real owner. And with respect to the terror in this

case not having affected the company at Whitney, the same might have been said of the terror to the East India Company, or the African Company, in the cases of burglaries in their houses, which have been before-mentioned, *ante* 24. There is a note to this case of Margetts and others, which states that Grose, J. asked whether there had not been a prosecution at the Old Bailey for a burglary in some of the halls of the city of London, in which it was clear that no part of the corporation resided, but in which the clerks of the company generally lived; and that Mr. Knapp informed the court, that his father was clerk to the Haberdashers' Company, and resided in the hall which was broken open; and in that case the court held it to be his father's house.

(r) *Rex v. Wilson*, K. T. 1806. MS. Bayley J., and Russ. & Ry. 115.

of it, and a burglary is committed in any of their apartments, the indictment should lay the offence as in the mansion of the proprietor of the house. (s) So that if the chamber of a guest at an inn be broken open, it must be laid in the indictment to be the mansion-house of the innkeeper. (t) It is indeed said, that if A., a lodger in an inn, goes to his chamber to bed, and his door is latched or locked, and afterwards in the night he rises, opens his chamber-door, steals goods in the house, and goes away, it may be a question whether this be a burglary; and it is also said, that it seems it would not, because A. had a kind of special interest and property in his chamber, and therefore that the opening of his own door was no breaking of the innkeeper's house. (u) But though this is the inclination of the opinion of a very great lawyer, the foundation on which it proceeds cannot easily be reconciled with the doctrine which he admits in the same page, and also in a subsequent part of his work, namely, that if A. had opened the chamber of B., another lodger in the inn, to steal his goods, it would have been burglary; and that though a lodger has a special interest in his chamber, yet a burglary committed in it must be laid as in the mansion-house of the innkeeper. (x) And it has been remarked, that this doctrine is also at variance with the reasoning, in a case subsequently decided, which supposes that a guest has not even the possession of a room in an inn for himself, but that it remains still in the possession of the host. (y)

guests, &c. in a house or inn.

In this last-mentioned case, the prosecutor, who was a Jew pedlar, came to a public-house to stay all night, and fastened the door of his bed-chamber; when the prisoner, pretending to the landlord, that the prosecutor had stolen his goods, under this pretence, with the assistance of the landlord and others, forced open the chamber door with intent to steal the goods mentioned in the indictment; and the prisoner accordingly stole them. These facts were found specially. Mr. Baron Adams, who tried the prisoner, doubting whether the bed-chamber could properly be called the dwelling-house of the prosecutor, as stated in the indictment, the case was submitted to the consideration of the judges. They all thought, that though the prosecutor had for that night a special interest in the bed-chamber, yet that it was merely for a particular purpose, namely, to sleep there that night as a travelling guest, and not as a regular lodger; that he had no *certain* and *permanent* interest in the room itself, but that both the property and the possession of the room remained in the landlord, who would be answerable *civiliter* for any goods of his guest that were stolen in that room, even for the goods then in question, which he could not be, unless the room were deemed to be in his possession. They thought also, that the landlord might have gone into the room when he pleased, and would not have been a trespasser to the guest: and that, upon the whole, the indictment was insufficient. (z)

Prosser's case. Where the prisoner, under pretence of being robbed, had forced open in the night the chamber-door of a guest in an inn, and stolen his goods; held, that the burglary should have been laid in the dwelling-house of the innkeeper, and not of the guest.

(s) 1 Hawk. P. C. c. 38. s. 26.

(t) 1 Hale 557.

(u) *Ibid.* 554.

(x) 1 Hale 554, 557.

(y) 2 East. P. C. c. 15. s. 15. p. 503.

where the learned writer says, that this deserves to be well weighed before any final resolution upon the point.

(z) Prosser's case, *cor.* Adams B.

The landlord in this case does not appear to have been privy to the felonious intent of the prisoner; but, on the contrary, was imposed upon by him, and induced to assist in breaking open the chamber, upon the supposition that the guest within it had been guilty of felony: but even if the landlord had been an accomplice in the act of the prisoner, it seems that his offence would not have been burglary; for though it has been said that if the host of an inn break the chamber of his guest in the night to rob him it is burglary, (a) that doctrine is questioned; and it is well observed, that there seems to be no distinction between that case and the case of an owner residing in the same house, breaking the chamber of an inmate having the same outer door as himself, which would not be burglary. (b)

Ownership
where there is
a tenant at
will.

If the owner of a house suffer a person to live in it rent free, it may be stated to be that person's house: he is tenant at will. The lessee of a house suffered his son-in-law to live in it, who failed and left it; but one of the son-in-law's servants continued in it. The lessee died, and the house was given up to the landlord, whose steward suffered the servant to continue in the house, and the only goods in it belonged to the servant. Upon an indictment for breaking the house in the day-time, the house was laid to be the servant's, and upon the point being saved, the judges thought that it was rightly laid, as the servant was there not as servant, but as tenant at will. (c) And it has been decided, that if the owner of a cottage lets one of his workmen, with his family, live in the cottage, free of rent and taxes, and he lives there principally, if not wholly for his own benefit, it may be described as the workman's cottage. One Gent, a workman in a colliery, had 15 shillings a-week, and a cottage for himself and family, free of rent and taxes: he occupied chiefly for his own benefit, and not for his master's. An indictment for burglary described this as the dwelling-house of Gent, and Holroyd J. thought that it might be considered, as to third persons, either as the master's house or the workman's: and the point being saved, the judges held that it might be described as the workman's, and that the conviction was right. (d)

The ownership
of apartments
let out to in-
mates depends
upon whether
the owner
sleeps under
the same roof,
and whether
there is but
one outer
door.

Though different opinions appear to have been formerly entertained upon the point, whether in the case of burglary in the hired apartment of an inmate it should be laid to be committed in the mansion-house of the inmate or of the owner; (e) it is now settled, that if the owner who lets out apartments in his house to other persons sleeps under the same roof, and has but one outer door at which he and his lodgers enter, all the apartments of such lodgers are parcel of the one dwelling-house of the owner; but, that if the owner does not himself dwell in the same house, or if he and his lodgers enter by different outer doors, the apartments so

Monmouth Sum. Ass. 1768. 2 East.
P. C. c. 15. s. 15. p. 502. 503.

(a) *Dalt.* c. 151. s. 4.

(b) 2 East. P. C. c. 15. s. 15. p. 502.
Kel. 84.

(c) *Rex v. Collett*, H. T. 1823. MS.

Bayley J., and *Russ. & Ry.* 498.

(d) *Rex v. Jobling*, M. T. 1823.

MS. *Bayley J.*, and *Russ. & Ry.* 525.

(e) 1 *Hale* 556. Kel. 83, 84. 1

Hawk. P. C. c. 38. s. 27. 1 *Bac. Ab.*
Burglary, (E) notes.

let out are the mansion, for the time being, of each lodger respectively. (f)

The following cases were decided in conformity to this rule. Carrell's case.
 A burglary was committed in a house which belonged to one Nash, who did not live in any part of it himself, but let the whole of it out in separate lodgings from week to week: and an inmate named Jordan had two apartments in the house; namely, a sleeping-room upon one pair of stairs, and a workshop in the garret; which he rented by the week as tenant at will to Nash. The workshop was the room broken open by the prisoner. And upon a case referred to the judges for their consideration, whether the indictment had properly charged the burglary in the dwelling-house of Jordan, ten of them were of opinion, that as Nash, the owner of the house, did not inhabit any part of it, the indictment was good. (g) So upon an indictment on the statute 3 & 4 W. Trapshaw's case.
 and M. c. 9. for robbery in a dwelling-house, where it appeared that the house was situated in a mews, and the whole of it let out in lodgings to three families, with only one outer door, which was common to all the inmates; one of whom rented the parlour on the ground-floor, and a single room up one pair of stairs; and that the parlour on the ground-floor was the part of the house broken open; all the judges held that the offence was well laid in the indictment, as having been committed in the dwelling-house of the particular inmate. (h) And in a recent case it was held, that if two or more rent of the owner different parts of the same house, so as to have amongst them the whole house, and the owner does not reserve or occupy any part, the separate parts of each may be described as the dwelling-house of each. Choice rented of the landlord a shop and other rooms in a house, and Ryan rented in the same house another shop and all the other rooms; and he rented them of the landlord also; the staircase and passage were in common, and the shops opened into the passage, which was enclosed, and was part of the house; all the taxes

(f) 4 Black. Com. 225. *Lee v. Gansel*, Cowp. 8. 2 East. P. C. c. 15. s. 18. p. 503. adopting the doctrine in Kel. 83, 84. And in *Rogers's case*, 1 Leach 90. is the following note by the editor:—"I have been favoured with the following opinion of Lord C. J. Holt upon this subject, from the manuscript notes of the late Lord C. B. Parker.—If inmates have several rooms in a house, of which rooms they keep the keys, and inhabit them severally with their families, yet, if they enter into the house at one outer door with the owner, these rooms cannot be said to be the dwelling-houses of the inmates, but the indictment ought to be for breaking the house of the owner. Mr. *Tanner*, an ancient clerk of the court, said, that the constant opinion and practice had been according to the opinion of

"Lord C. J. Kelynge, which opinion was cited by Lord C. J. Holt upon this occasion at the Old Bailey October Session, 1701."

(g) *Carrell's case*, O. B. 1782, considered of by the judges, E. T. 1782. 1 Hawk. P. C. c. 88. s. 32. 1 Leach 237. 2 East. P. C. c. 15. s. 18. p. 506. The judges relied on *Rogers's case*, 1 Leach 90. *ante* note (f) and *post* 30. The two other judges (*Eyre B.* and *Buller J.*) who thought that it was not the mansion-house of Jordan, were of opinion that it might have been laid to have been the mansion-house of Nash; to which some of the other judges inclined, if it were not the mansion of Jordan.

(h) *Trapshaw's case*, O. B. 1786. and Hil. T. 1787. 1 Hawk. P. C. c. 38. s. 30. 1 Leach 427. 2 East. P. C. c. 15. s. 18. p. 506.

were paid by Choice. The prisoner broke open the passage door of Ryan's shop, and was indicted for burglary in the dwelling-house of Ryan: and upon the point being saved, the judges had no doubt but that this was rightly described as the house of Ryan, and held that the conviction was right. (*i*)

Rogers's case.

Consistently also with this rule, an occupation of some part of the house by the owner, which does not amount to an inhabiting, will not make the house such as may be stated to be his dwelling-house in an indictment for burglary. The owner of a house let the whole of it in apartments to different persons, and did not inhabit any part himself. One of the inmates rented the bottom part of the house, namely, a shop, a parlour, and a cellar, (which ran underneath the shop and parlour,) at a yearly rent; but the owner had taken back the cellar for the purpose of keeping wood and lumber in it, and made an allowance to the inmate of ten shillings a-year, which was deducted from the rent. The entrance to the house was by a common outer door from the street. The shop and parlour were broken open. And upon an indictment for burglary, laying the offence to have been committed in the dwelling-house of the inmate, nine of the judges agreed that this was proper; that it could not have been laid to be the dwelling-house of the owner, as he did not inhabit any part of it, but only occupied the cellar: but that it would have been otherwise if the owner had occupied any part of the house. (*k*)

Ownership where there is an actual severance, and no internal communication.

Where there is an actual severance of a house in fact, by a partition or the like, all internal communication being cut off, and each part being inhabited by several occupants, separate and distinct mansions in law will be constituted. (*l*) And this may be, though the rent and taxes of the whole premises be paid jointly out of the partnership fund of the several occupants.

Jones's case. Several occupations of distinct parts of the same house by two partners may constitute distinct mansions for each partner, though the rent and taxes be paid from the joint fund.

The prisoner was indicted for burglary and larceny in the dwelling-house of Thomas Smith and John Knowles. It appeared that these persons were in partnership, and lived next door to each other. The two houses had formerly been one house only, but had been divided for the purpose of accommodating the respective families of each partner, and were then perfectly distinct and separated from each other, there being no communication from the one to the other without going into the street. The house-keeping, servants' wages, &c. were paid by each partner respectively; but the rent and taxes of both the houses were paid jointly out of the partnership fund. The prisoner was servant to Smith, and it was in his house that the burglary was committed. It was objected upon these facts, that although the two houses were the joint property of both the partners, yet they were the separate and respective mansions of each, and therefore that the burglary ought to have been laid as committed in the house of Smith only. And the court conceived the objection to be well founded, and directed the jury to acquit the prisoner of the capital part of the charge. (*m*)

(*i*) *Rex v. Bailey*, E. T. 1824. MS. s. 19. p. 506, 507.
Bayley J., and *Ry. & Moo.* C. C. 23. (*l*) 2 *East. P. C. c.* 15. s. 17. p. 504.
(*k*) *Rogers's case*, O. B. 1772. and (*m*) *Rex v. Jones*, 1 *Hawk. P. C.*
M. T. 1772. 1 *Hawk. P. C. c.* 38. s. c. 38. s. 34. 1 *Leach* 537. 2 *East. P. C.*
29. 1 *Leach* 89. 2 *East. P. C. c.* 15. c. 15. s. 17. p. 504. In *Tracy v. Tal-*

In a more recent case also, it appears to have been ruled that a contribution by one of two partners of a proportion of the rent and taxes, for certain premises used in the partnership concern, did not give him such a joint possession of those premises as to make it necessary to state them in the indictment as the dwelling-house of both the partners. The indictment was for stealing in the dwelling-house of James Moreland: and the evidence was, that Moreland and one Gutteridge were co-partners; that Moreland was the lessee of the whole premises, and paid all the rent and taxes for them; and that Gutteridge had an apartment in the house, and allowed Moreland a certain sum for board and lodging, and also a certain proportion of the rent and taxes for the shop and warehouses. The felony was committed in the shop. It was contended, that Gutteridge under these circumstances had a joint possession of the shop and warehouses, and that the indictment should have been framed accordingly; but the point being saved upon this objection for the consideration of the judges, they were of opinion that the indictment was right. (n) Parminster's case.

If a house be let to A. and a warehouse under the same roof, and with an inner communication, to A. and B., the warehouse cannot be described as the dwelling-house of A. The indictment was for a burglary in the dwelling-house of Josiah Richards; and the breaking was into warehouses under the same roof with Josiah Richards's dwelling-house, and communicating with it internally; but the dwelling-house was let to J. Richards alone, and the warehouses were let to him and his brother, who lived elsewhere. Upon a case reserved, the judges held that the warehouses could not be deemed part of J. Richards's dwelling-house, as they were let to him and his brother, though by the same landlord, and that the conviction was therefore wrong. (o)

As, according to the rule which has been stated as now established upon this subject, where the owner of a house lets out apartments in it to lodgers, but continues to inhabit some part of the house himself, and has but one outer door common to him and his lodgers, such apartments must be considered as parcel of his dwelling-house; (p) it will be a necessary consequence that if he should break open the apartments of his lodgers in the night and steal their goods, the offence will not be burglary; on the ground that a man cannot commit burglary by breaking open his own house. (q)

Owner of a house breaking open the apartments of his lodgers will not be guilty of burglary.

III. The definition of burglary now leads us to the time at Of the time at

bot, 2 Salk. 532. (a case upon a distress for a poor's rate) it was ruled by Holt, C. J., that if two several houses are inhabited by several families who make and have but one common avenue or entrance for both; yet, in respect of their original, both houses continue rateable severally, for they were at first several houses; and if one family goes, one house is vacant. But if one tenement be divided by a partition, and inhabited by different families, namely, the owner in one

and a stranger in another, these are several tenements, severally rateable while they are thus severally inhabited; but, if the stranger and his family go away, it becomes one tenement.

(n) Parminster's case, 1 Leach 537 note (a).

(o) Rex v. Jenkins, East. T. 1813, MS. Bayley, J., and Russ. & Ry. 244.

(p) *Ante*, 28.

(q) 2 East. P. C. c. 15. s. 18. p. 506. *Ante*, 28.

which the offence must be committed, namely, the night.

The breaking and entering need not be both in the same night.

which the offence must be committed. This time must be the *night*; for in the day-time there can be no burglary. (r) It appears that anciently the day was accounted to begin only at sun-rising, and to end immediately upon sun-set; but it is now settled as the better opinion that if there be day-light or twilight enough begun or left whereby the countenance of a person may be reasonably discerned, it is no burglary. (s) But this does not extend to moon-light; for then midnight house-breaking might be no burglary. (t) Besides, the malignity of the offence does not so properly arise from its being done in the dark, as *at the dead of night*; when all the creation, except beasts of prey, are at rest; when sleep has disarmed the owner, and rendered his castle defenceless. (u)

The breaking and entering need not be both done in the same night: for if thieves break a hole in a house one night, with intent to enter another night and commit felony, and come accordingly another night and commit a felony through the hole they so made the night before, this seems to be burglary; for the breaking and entering were both *noctanter*, though not the same night. (x) And this doctrine was recognized in a late case. The prisoner broke the glass of the prosecutor's side-door on the Friday night, with intent to enter at a future time, and actually entered on the Sunday night: and upon a case reserved, the Judges held this to be burglary, the breaking and entering being both by night, and the breaking being with intent afterwards to enter, (y) It is said, however, that if the breaking be in the day-time and the entering in the night, or the breaking in the night, and entering in the day, it will not be burglary. (z) But upon this position it has been remarked that the authority upon which it appears to have proceeded (a) does not fully prove the point for which it is cited, but only furnishes a resolution to the effect that if thieves enter in by night at a hole in the wall, which was there before, it is not burglary, without stating who made the hole, and of course not coming up to the case of a hole made by the thieves themselves in the day-time, with intent to enter more securely at night. (b) And it is observable that it is elsewhere given as a reason why the breaking and entering, if both in the night, need not be both in the same night, that it shall be supposed that the thieves brake and entered in the night when they entered, for that the breaking makes not the burglary till the entry; (c) which reasoning, if applied to a breaking in the day-time, and an entering in the night, would seem to refer the whole transaction to the entry, and make such breaking and entering also a burglary.

(r) 4 Black. Com. 224.

(s) 3 Inst. 63. 1 Hale 550, 551. Sum. 79. 1 Hawk. P. C. c. 38. s. 2. 1 Bac. Ab. *Burglary* (D). 4 Black. Com. 224. 2 East. P. C. c. 15. s. 21. p. 509.

(t) 1 Hale 551.

(u) 4 Black. Com. 224.

(x) 1 Hale, 551. 4 Black. Com. 226.

Ante, 12.

(y) Rex v. Smith, East. T. 1820. MS. Bayley, J., and Russ. & Ry. 417.

(z) 1 Hale, 551.

(a) Crompt. 33 a. *ex* 8 Ed. IV. cited by Lord Hale, 551.

(b) Note (k) to 1 Hale, 551. (ed. 1800. 2 East. P. C. c. 15. s. 21. p. 509.

(c) 1 Hale, 551.

IV.—The last part of the definition of burglary relates to the *intent*. The act of breaking and entering the mansion-house in the night must be done “with intent to commit some felony within the same, whether such felonious intent be executed or not.” (d) And where the breaking is a breaking out of the dwelling-house in the night there must have been a previous entry with intent to commit a felony, or an actual committing of a felony in such dwelling-house. (e)

Of the intent to commit a felony.

If the intention of the entry be either laid in the indictment, or appear upon the evidence, to have been only for the purpose of committing a *trespass*, the offence will not be burglary. Therefore, an intention to beat a person in the house will not be sufficient to sustain the indictment; for though killing or murder may be the consequence of beating, yet if the primary intention were not to kill, the intention of beating will not make burglary, (f) The entry must be for a felonious purpose. (g) It should, however be observed, that if a felony be actually committed, the act will be *prima facie* pregnant evidence of an intent to commit it; and it is a general rule, that a man who commits one sort of felony in attempting to commit another, cannot excuse himself upon the ground that he did not intend the commission of that particular offence. (h) But it seems that this must be confined to cases where the offence intended is in itself a felony. (i)

An intent to commit a trespass will not be sufficient.

The prisoner was indicted for burglary, in breaking and entering the stable of one James Bayley, part of his dwelling-house, in the night, with a felonious intent to kill and destroy a gelding of one A. B. there being. The facts were, that the gelding was to have run for forty guineas, and that the prisoner cut the sinews of his fore leg to prevent his running, in consequence of which he died. Parker, Ch. B., before whom the prisoner was tried, ordered him to be acquitted, on the ground that his intention was not to commit the felony by killing and destroying the horse, but a trespass only to prevent his running; and that therefore no burglary. (k)

Dobbs's case.

The prisoner, being a servant or journeyman to one John Fuller, was employed to sell goods, and receive the money for his master's use. In the course of the trade he sold a large parcel of goods, for which he received a hundred and sixty guineas, none of which he put into the till, nor in any way gave into his master's possession; but deposited ten guineas of the sum in a private place in the chamber where he slept, and carried off the remaining hundred and fifty on leaving his service, from which he decamped before the embezzlement was discovered. He left a trunk containing some of his clothes, as well as the ten guineas, behind him; but afterwards in the night time broke open his master's house,

Dingley's case.

(d) *Ante*, 2.

(e) *Ante*, 7.

(f) 1 Hale 561.

(g) 3 Inst. 65. 1 Hale 559, 561. Sum. 83. Kel. 47. 1 Hawk. P. C. c. 38. s. 36. 1 Bac. Ab. *Burglary*, (F.) 4 Black. Com. 227.

(h) 1 Hale 560. 2 East, P. C. c. 15.

s. 22. p. 509. s. 25. p. 514, 515. Kel. 47.

(i) 2 East. P. C. c. 15. s. 24. p. 515.

(k) Dobb's case, *cor.* Parker, Ch. B., *Buckingham* Sum. Ass. 1770, 2 East. P. C. c. 15. s. 25. p. 513. But it appears that the prisoner was again indicted for killing the horse, and capitally convicted. *Id. Ibid.*

and took away with him the ten guineas which he had so deposited in the private place in his bed-chamber. This was held to be no burglary, because the taking of the money was no felony; for although it was the master's money in *right*, it was the servant's money in *possession*, and the original act was no felony. (*l*)

Case of Knight
and Roffey.

In another case also, the decision proceeded upon the same ground, namely, that the intention was not to commit a felony. The prisoners were indicted for a burglary in the dwelling-house of Mary Snelling, the intent being laid to steal the goods of one Leonard Hawkins. It appeared that Hawkins, who was an excise officer, had seized some bags of tea in a shop entered in the name of Smith, as being there without a legal permit; and had removed them to Mary Snelling's, where he lodged. The prisoners and many other persons broke open Mary Snelling's house in the night, with intent to take this tea. It was not proved that Smith was in company with them; but the witnesses said, that they supposed the tea to belong to Smith; and supposed that the fact was committed either in company with him, or by his procurement. The jury, being directed to find as a fact with what intent the prisoners broke and entered the house, found that they intended to take the goods on the behalf of Smith; and, upon the point being reserved, all the Judges were of opinion that the indictment was not supported; as, however outrageous the conduct of the prisoners was, in so endeavouring to get back Smith's goods, still there was no intention to steal. (*m*)

The felony
intended may
be either
felony at
common law
or by statute.

It is quite clear, therefore, that the entry must be with a *felonious intent*. And it seems also to be now well established, contrary to some opinions which have been formerly entertained upon the point, (*n*) that it makes no difference whether the offence intended were felony at common law, or only created so by statute; and the reason given for the better opinion is this, that

(*l*) Dingley's case, cited by Const, *arguendo* in Bazeley's case, 2 Leach 840, 841. where he mentions it as cited by Sir B. Shower, in his argument in the case of Rex v. Meers, 1 Show. 53. and there said to be reported by Gouldsborough 186. Mr. Const further said, that he had been favoured with a manuscript report of it, extracted from a collection of cases in the possession of the late Mr. Reynolds, clerk of the arraigns at the Old Bailey, under the title of Rex v. Dingley, by which it appeared that the special verdict was found at the Easter Sessions, 1687, and argued in the King's Bench in Hil. T. 3 Jac. 2. and in which it was said to have been determined that this offence was not burglary, but trespass only. See the case cited also as Rex v. Dingley, 1 Hawk. P. C. c. 38. s. 37. and as a case Anon. in 2 East. P. C. c. 15. s. 22.

p. 510.

(*m*) Rex v. Knight and Roffey, East. T. 1782. 2 East. P. C. c. 15. s. 22. p. 510. Some of the Judges held, that if the indictment had been for breaking the house with intent feloniously to rescue goods seized, &c. which was made felony by 19 Geo. 2. c. 34. (many provisions of which are now repealed, see vol. 1. p. 117.) it would have been burglary. But they agreed, that even in that case some evidence would have been necessary on the part of the prosecutor as to the goods being uncustomed, in order to throw the proof that the duty was paid on the prisoners: but that the goods being found in oil cases, or in great quantities in an unentered place, would have been sufficient for that purpose.

(*n*) 1 Hale 562. Crompt. 32. 2 East. P. C. c. 15. s. 22. p. 511.

whenever a statute makes any offence felony, it incidentally gives it all the properties of a felony at common law. (o)

It is necessary to ascertain with exactness the felony really intended, as it must be laid in the indictment, and proved, agreeably to the fact. And a felony intended to be committed will not support an indictment charging a felony actually committed. Thus where, upon an indictment for burglary and stealing goods, it has appeared that there were no goods stolen, but that the burglary was with intent to steal, it has been holden that the indictment was not supported by the evidence. (p) So, if it be alleged, that the entry was with intent to commit one sort of felony, and it appears upon the facts that it was with intent to commit another; it will not be sufficient. (q) And where the charge is of a felony intended to be committed by stealing goods, the property in the goods must be correctly stated. Thus, where an indictment charged a burglary in the house of one Joseph Davis, with intent to steal the goods of the said Joseph Wakelin; and it appeared that no such person as Joseph Wakelin had any property in the house, but that in fact the name *Wakelin* had been inserted by mistake in the indictment instead of *Davis*, though Lawrence, J., before whom the prisoner was tried, inclined to think that the mistake was not material *as to the burglary*, a majority of the Judges were afterwards of opinion (the point being saved for their consideration,) that in an indictment of this description it was necessary to shew to whom the property belonged, in order to render the charge complete; and that the words "*of the said Joseph Wakelin*," being material, could not be rejected as surplusage. (r)

But if the indictment charge a burglary with intent to commit a felony, it will be supported by evidence of a felony actually committed. (s) And it seems sufficient in all cases where a felony has actually been committed, to allege the commission of it; as that is sufficient evidence of the intention. (t) But the intent to commit a felony, and the actual commission of it, may both be alleged; and in general this is the better mode of statement. (u)

It should be observed also, that different intents may be stated in the indictment. Thus, where the first count of an indictment for burglary laid the fact to have been done with intent to steal

The felony really intended must be stated correctly, and proved according to the fact.

But different intents may be laid in the indictment.

(o) 1 Hawk. P. C. c. 38. s. 38. 4 Black. Com. 228. 1 Bac. Ab. *Burglary* (F). 2 East. P. C. c. 15. s. 22. p. 511. *Rex v. Locost and Villars*. Kel. 30. *Rex v. Gray*, 1 Str. 481, *Rex v. Knight and Roffey*, ante, note (m).

(p) 2 East. P. C. c. 15. s. 25. p. 514. *Rex v. Vandercomb and Abbott* 2 Leach 717.

(q) 2 East. P. C. c. 15. s. 25. p. 514.

(r) *Jenks's case*, O. B. 1796, cor. *Macdonald, C. B., Buller, J., and Lawrence, J.*, and considered of by the judges, Mich. T. 1796, 2 Leach 774. 2 East. P. C. c. 15. s. 25. p. 514, where

it is said, that this it seems is not like the case of laying a robbery in the dwelling-house of A. which turns out to be the dwelling-house of B., because that circumstance is perfectly immaterial in robbery, which is ousted of clergy generally.

(s) *Rex v. Locost and Villars*, Kel. 30. an indictment for a burglary with intent to commit a rape, and evidence of a rape actually committed.

(t) 1 Hale 560. 2 East. P. C. c. 15. s. 25. p. 514. *Rex v. Furnival*, East. T. 1821, Russ. & Ry. 445.

(u) 1 Hale 559. *Rex v. Furnival*, Russ. & Ry. 446.

the goods of a person ; and the second count laid it with intent to murder him ; it was objected, upon a general verdict of guilty, that there were two several capital charges in the same indictment, tending to deprive the prisoner of the challenges to which he would have been entitled if there had been distinct indictments, and also tending to perplex him in his defence ; but the indictment was holden good, on the ground that it was the same fact and evidence, only laid in different ways. (x)

Of the proceedings.

Having thus treated of the offence of burglary, according to its definition, we may enquire shortly concerning the proceedings against offenders by indictment.

Indictment. Allegation that the fact was done in the night.

It is essential that the indictment should state the fact to have been done in the night, *noctanter*, or *nocte ejusdem diei*. (y) And it must also express at about what hour of the night it happened ; as where an indictment only alleged the fact to have been committed in the night, but did not express about what hour it was done, Gould J., held it insufficient as for a burglary, and directed the prisoner to be found guilty of a simple felony only. And he gave as a reason, that as the rule now established is that a burglary cannot be committed during the *crepusculum*, it is therefore necessary to specify the hour, in order that the fact may appear, upon the face of the indictment, to have been done between the twilight of the evening and that of the morning. (z) It is not necessary, however, that the evidence should correspond with the allegation as to the hour, so that it shews the fact to have been committed in the night. (a)

Allegation as to the mansion or dwelling-house.

The offence must be laid, as we have seen, to have been committed in a mansion-house, or dwelling-house, the term *dwelling-house* being that more usually adopted in modern practice. (b) It would not be sufficient to lay it generally as having been committed in a house. (c) Where the burglary has been committed in such an outhouse as by law is considered part of the dwelling-house, it must be laid as having been done in the dwelling-house, or in a stable, barn, &c. part of the dwelling-house ; either of which statements may be adopted. (d) The parish in which the dwelling-house is laid to be situate must be correctly stated, as a variance in this respect will be fatal. (e) Upon an indictment for stealing

(x) Thompson's case, *Norfolk Sum. Ass.* 1781, and *Mich. T.* 1781, when the case was considered of by seven judges only, who were unanimous that the indictment was good. 2 East. P. C. c. 15. s. 26. p. 515.

(y) 1 Hale 549. *Ante*, 1, 32.

(z) Waddington's case, *Lancaster Lent Ass.* 1771. 1 Burn's Just. *Burglary*, S. I. 2 East. P. C. c. 15. s. 24. p. 513. In 2 Hale 179. it is said, that the indictment ought to be *tali die circa horam decimam in nocte ejusdem diei felonice et burglariter fregit*; but that according to some opinions *burglariter* carries a sufficient expression

that it was done in the night.

(a) 2 East. P. C. c. 15. s. 24. p. 513.

(b) *Ante*, 12, *et sequ.*

(c) 1 Hale 550.

(d) Garland's case, 1 Leach 144. where an outhouse having been broken open, the indictment was for breaking and entering *the dwelling-house*: and Dobbs's case, 2 East. P. C. c. 15. s. 24. p. 512. and s. 25. p. 513. where the indictment was for breaking and entering the stable of J. B. *part of his dwelling-house*.

(e) 2 Stark. Crim. Plead. 415. note (c).

in a dwelling-house, it has been held that if it is not expressly stated where the dwelling-house is situated, it shall be taken to be situate at the place named in the indictment by way of venue. The indictment stated that the prisoner on, &c. at Liverpool, one coat of J. S., of the value of 40s. in the dwelling-house of W. T., then and there being, then and there feloniously did steal: and, a case being reserved upon the question whether the indictment shewed sufficiently that the dwelling-house was situate at Liverpool; the judges held that it did. (f)

The allegation of the offence having been committed in a mansion-house, must be understood, however, as confined to burglaries in private houses; for though it has been quaintly observed, that a church is *domus mansionalis Dei*, (g) it is the better opinion that the indictment, in the case of a burglary committed in a church, need not proceed upon such a supposition, but will be more properly framed, according to the truth of the fact, by stating the offence to have been committed in the parish church of the parish to which it belongs. (h)

It is necessary to state the name of the owner of the dwelling-house, in the indictment, with accuracy, and such certainty to a common intent, as is, in general, necessary in the description of a party who has sustained an injury. (i) In a case where the indictment stated the burglary to have been committed in the shop *cujusdam Ricardi*, without mentioning the surname of the owner, it was doubted whether it was good. (k) And where the name of the owner of the dwelling-house was altogether mistaken, as where the indictment laid the burglary to have been committed in the dwelling-house of John Snoxall, and it appeared that it was not the dwelling-house of John Snoxall, it was holden that the prisoner could not be found guilty either of the burglary, or of stealing to the amount of forty shillings in the dwelling-house: it being essential, in both cases, to state in the indictment the name of the person in whose house the offences are committed. (l) And where the prisoner was indicted for stealing in the dwelling-house of Sarah Lunns, and it appeared in evidence that her name was Sarah London; the variance was holden to be fatal to the capital part of the indictment. (m)

Statement of the name of the owner of the dwelling-house.

The terms of art usually expressed by the averment "feloniously and burglariously did break and enter" are essentially necessary to the indictment. The word *burglariously* cannot be expressed by any other word or circumlocution; and the averment that the prisoner *broke and entered* is necessary, because a

Terms of art —burglariously,—and broke and entered.

(f) *Rex v. Napper*, Mich. T. 1824, MS. Bayley, J., and Ry. & Mood. C. C. 44.

(g) 3 Inst. 64.

(h) 1 Hale 556. 1 Hawk. P. C. c. 38. s. 17. 2 East. P. C. c. 15. s. 24. p. 512.

(i) 2 East. P. C. c. 15. s. 24. p. 513. 1 Chit. Crim. Law 215, *et sequ.* 3 Chit. Crim. Law 1096. *Ante*, 20, *et sequ.*

(k) *Cole's case*, Moor 466. 1 Hale 558. 2 East. P. C. c. 15. s. 24. p. 513.

In *Moor* it is said to have been holden good; but this is not mentioned by Lord Hale. In 3 Chit. Crim. L. 1098, it is said that there can be little doubt that at the present day such an omission would be considered as material.

(l) *White's case*, O. B. 1783, 1 Leach 252. 2 East. P. C. c. 15. s. 24. p. 513.

(m) *Woodward's case*, O. B. 1785. *cor.* *Adair*, Serjeant, Recorder. 1 Leach 253, note (a).

Of laying the intent; and of joining burglary and larceny in the same indictment.

breaking without an entering, or an entering without a breaking, will not make burglary. (n)

With respect to the intent, it is clear that it must be expressly alleged in the indictment, and proved agreeably to the fact, either that the party committed a felony in the dwelling-house, or that he broke and entered the house with intent to commit a felony therein. (o) And it seems to be the better course first to lay the intent, and then state the particular felony, if a felony has actually been committed. For though where an indictment charges that the prisoner "the dwelling-house of A. B. feloniously and burglariously did break and enter and the goods of A. B. then and "there feloniously and burglariously did steal, take," &c. it comprises two offences, namely, burglary and larceny; and the prisoner may therefore be acquitted of the burglary, and found guilty only of the larceny; yet it seems he cannot be found guilty of the burglary if he be acquitted of the larceny; on the ground that when the offence is so charged the larceny constitutes part of the burglary. (p) It has therefore been recommended, by high authority, as the better way, to charge the prisoner with breaking, &c. with intent feloniously and burglariously to steal, &c. and to add also the particular felony; as upon such an indictment he may be convicted of a simple burglary, though acquitted of the felony. (q)

Of joining three offences in the same indictment.

It was also said, by the same high authority, that three offences might have been joined in the same indictment; namely, burglary, larceny, and felony, upon the statute of 5 & 6 Ed. 6. c. 9. (r) for robbing a person in a dwelling-house, the owner, his wife, &c. then being within, whether waking or sleeping. And that upon such indictment, which need not have concluded against the form of the statute, the prisoner might have been convicted of the burglary, and found not guilty of felony; or convicted of the felony upon the statute 5 & 6 Ed. 6. c. 9. and found not guilty of the burglary; in either of which cases he would have been ousted of his clergy; or he might have been convicted of the larceny only, and found not guilty of the burglary and the felony upon the statute; in which case he would have been entitled to his clergy. (s)

Of laying different intents.

We have already seen that different intents may be stated in the indictment; and such a mode of proceeding, by laying the same fact in different ways, may be rendered expedient by the particular circumstances of the case. (t)

Of the plea of *autrefois acquit*.

Rex v. Vandercomb and Abbott.
A prisoner indicted for burglary, in

It was decided in an important case, in which the point was fully considered, that an acquittal upon an indictment for burglary, in breaking and entering a dwelling-house *and stealing* goods, cannot be pleaded in bar to an indictment for burglary in the same dwelling-house, and on the same night, *with intent* to steal; on the ground that the several offences described in the two indictments could not be said to be the same.

(n) 1 Hale 550. 2 East. P. C. c. 15. s. 24. p. 512. *Ante*, 2.

(o) 1 Hale 550. *Ante*, 33, *et seq.*

(p) 1 Hale 559, 560.

(q) 1 Hale 560.

(r) Now repealed by 7 and 8 Geo. 4. c. 27.

(s) 1 Hale 561. 2 East. P. C. c. 15. s. 27. p. 516.

(t) *Ante*, 33.

The indictment charged the prisoners with burglariously breaking and entering the dwelling-house of Merial Nevill and Ann Nevill, *with intent to steal* their goods; and they pleaded a plea of autrefois acquit upon a former indictment, which indictment charged them with burglariously breaking and entering the dwelling-house of Merial Nevill and Ann Nevill, *and stealing* goods of Merial Nevill, goods of Ann Nevill, and goods of one Susanna Gibbs. The plea concluded with averring the identity of the persons of the prisoners, and that the burglary was the same identical and individual burglary. To this plea there was a demurrer, which was argued before all the Judges of England; and their opinion was afterwards delivered by Mr. Justice Buller at the Old Bailey June Session 1796.

breaking and entering a dwelling-house *with intent to steal*, cannot plead in bar an acquittal upon an indictment for the same burglary which charged a breaking and entering the same dwelling-house and stealing there.

The learned judge said that it had been contended on behalf of the prisoners, that as the dwelling-house in which, and the time when, the burglary was charged to have been committed were precisely the same both in the indictment for the burglary *and stealing* the goods, on which they were acquitted, and in the indictment for the burglary *with intent to steal* the goods, which was then depending, the offence charged in both was, in contemplation of law, the same offence, and that of course the acquittal on the former indictment was a bar to all further proceeding on the latter. He then proceeded, "It is quite clear, that at the time the felony was committed, there was only one act done, namely, the breaking the dwelling-house. But this fact alone will not decide this case; for burglary is of two sorts; first, breaking and entering a dwelling-house in the night time, *and stealing goods therein*; secondly, breaking and entering a dwelling-house in the night time, *with intent to commit a felony*, although the meditated felony be not in fact committed. The circumstance of *breaking* and *entering* the house is common and essential to both the species of this offence: but it does not of itself constitute the crime in either of them; for it is necessary, to the completion of burglary, that there should not only be a breaking and entering, but the breaking and entering must be accompanied with a felony actually committed, or intended to be committed; and these two offences are so distinct in their nature, that evidence of one of them will not support an indictment for the other. (u) In the present case, therefore, evidence

(u) It is well established that an indictment for breaking and entering, &c. *and stealing* goods, will not be supported by evidence of a breaking and entering, &c. *with intent to steal* them. But it has been supposed, that an indictment for breaking and entering, &c. *with intent to steal*, will be supported by evidence of breaking and entering, &c. and an actual stealing. *Ante*, 35, 38. If this be so, the report of the judgment delivered by Mr. J. Buller, as here given, states the point too largely; as it seems to go to the extent of saying that evidence of a breaking and entering, and

a felony actually committed will not support an indictment for a breaking and entering, &c., and a felony intended to be committed. In 2 East. P. C. c. 15. s. 29. p. 520. the learned author observes upon this case, and says, "*Quære*, whether the definition of the crime be not solely resolvable into the breaking, &c. with an intent to commit felony; of which the actual commission is such a strong presumptive evidence that the law has adopted it, and admits it to be equivalent to a charge of the intent in an indictment. And therefore an indictment charging

“ of the breaking and entering with intent to steal, was rightly held not to be sufficient to support the indictment charging the prisoner with having broke and entered the house, and stolen the goods stated in the first indictment ; and if crimes are so distinct, that evidence of the one will not support the other, it is as inconsistent with reason, as it is repugnant to the rules of law, to say that they are so far the same that an acquittal of the one shall be a bar to a prosecution for the other.”

The learned judge then observed, upon the cases which had been cited on behalf of the prisoners, in support of the proposition contended for by their counsel ; namely, Turner's case, (x) and the case of Jones and Beaver. (y) In Turner's case it was agreed that the prisoner having been formerly indicted for burglary, in breaking the house of a Mr. Tryon, and stealing his goods, and acquitted, could not be indicted again for the same burglary, in breaking his house, and stealing therein the money of one Hill, (a servant of Mr. Tryon) but that he might be indicted for felony in stealing the money of Hill. Upon this case Mr. J. Buller observed : “ The decision was not a solemn judgment, for the prisoner was not indicted a second time for the burglary ; it was merely a direction from the Judges to the officer of the court how to draw the second indictment for the larceny ; and it proceeded upon a mistake, as I shall presently shew. If the Judges in that case exercised a little lenity before the indictment, which might more properly have been done after conviction, much censure could not fall on them. But they proceeded on the ground that Turner, having been indicted for burglary in breaking the house of Mr. Tryon, and stealing his goods, and acquitted thereof, could not be again indicted for the same burglary for breaking the house, though he might be indicted for stealing the money of Hill, for which he had not been indicted before : and he was indicted accordingly. The Judges, therefore, must have conceived that the *breaking the house* and the *stealing the goods* were two distinct offences ; and that breaking the house only constituted the crime of burglary ; which is a manifest mistake : for the burglary consisted in breaking the house and stealing the goods ; and if stealing the goods of Hill was a distinct felony from that of stealing the goods of Tryon, which it was admitted to be, the burglaries could not be the same.”

With respect to the case of Jones and Beaver, the learned Judge said, that it proceeded entirely upon the decision in Turner's case ; and that, the foundation failing, the superstructure could not stand. (z)

“ the breaking, &c. to be *with intent* to steal, is said to be supported by proof of *actual stealing* ; though certainly not vice versa.”

(x) Kel. 30.

(y) Kel. 52.

(z) Rex v. Jones and Beaver, Kel.

50. The prisoners were indicted for burglariously breaking and entering the dwelling-house of Lord Cornbury,

and stealing his goods therein ; and, being acquitted, were afterwards indicted for the same burglary, in breaking and entering Lord Cornbury's house, and stealing the goods of a Mr. Nunessey : and it was agreed that, as they had been before acquitted, they could not be indicted again for the same burglary, but that they might be indicted for the felony

The learned judge then referred to several authorities, (a) and continued, "These cases establish the principle, that unless the first indictment were such as the prisoner might have been convicted upon by proof of the facts contained in the second indictment, an acquittal on the first indictment can be no bar to the second. Now, to apply the principle to the present case: the first indictment was for burglariously breaking and entering the house of *Miss Nevills*, and *stealing the goods* mentioned; but it appeared that the prisoner broke and entered the house *with intent to steal*; for, in fact, no larceny was committed, and therefore they could not be convicted on that indictment. But they have not been tried for burglariously breaking and entering the house of the *Miss Nevills with intent to steal*, which is the charge in the present indictment, and therefore their lives have never been in jeopardy for this offence. For this reason, the Judges are all of opinion that the plea is bad; that there must be judgment for the prosecutor upon the demurrer; and that the prisoners must take their trials on the present indictment." And the prisoners were accordingly tried, and convicted. (b)

Autrefois acquit, will not be an effective plea unless the facts contained in the second indictment would, if true, have sustained the first indictment.

Though it is not professed in this treatise to enter minutely into the points decided upon the pleadings in criminal cases, it may be here mentioned, with reference to the important plea of *autrefois acquit*, that, in a late case, the doctrine was recognized that such plea is no bar unless the facts charged in the second indictment would have warranted a conviction upon the first. So that if the offence charged in the second indictment is in one king's reign, and the first indictment was confined by the *contra pacem* to the preceding reign, an acquittal upon the first could not be pleaded in bar to the second. To an indictment for keeping a gaming house in the time of Geo. 4th, the defendant pleaded that at a sessions in 4 Geo. 4. he was indicted for that he, on the 18th January, 57 Geo. 3. and on divers other days between that day and the taking of that inquisition, kept a gaming house against the peace of our said lord the king, that he was tried and acquitted, and that the offence on both indictments was the same. To this there was a demurrer, and it was urged that the *contra pacem* in the first indictment tied up the prosecutor to the proof of an offence in the time of Geo. the third, for Geo. the third being the only king named in that indictment, "our said lord the king" in that indictment must have referred to him, and then the defendant could not have been punished in that indictment for keeping the house in the time of King Geo. the 4th. And the demurrer was held good. (c)

In the preceding case of *Rex v. Vandercomb* the property in the goods was laid differently in the two indictments. The first, upon which the prisoners had been acquitted, stated some of the goods stolen to belong to *Merial Nevill*, others to *Ann Nevill*, and others

A party indicted for burglary, and stealing the goods of a

in stealing the goods of Mr. Nunesey, precisely as had before been done in *Turner's case*.

(a) 2 Hawk. P. C. c. 35. s. 3. Fost. 361, 362. *Rex v. Pedley*, 1 Leach.

242.

(b) *Rex v. Vandercomb and Abbott*, 1796, 2 Leach. 716. 2 East. P. C. c. 15. s. 29. p. 519.

(c) *Rex v. Taylor*, 3 B. & C. 502.

particular person, and acquitted, may afterwards be indicted for the same burglary, and stealing the goods of a different person.

7 & 8 G. 4. c. 28. s. 3.

If a prisoner be charged with a burglary and stealing the goods, the prosecutor, on failing to prove that these facts were committed on the day laid in the indictment, cannot be admitted to prove that the larceny was committed on a former day.

Verdict.

to Susanna Gibbs; and the second indictment stated the goods intended to be stolen to belong to Merial and Ann Nevill only. And it is said that Buller, J., in delivering the opinion of the Judges on the case, observed, that the property in the goods was differently described in the two indictments, and said, that this might afford another objection to the plea; but that he had not entered into the consideration of the circumstance, as the case did not require it. (d) And the ancient doctrine, that a person indicted and acquitted for breaking and entering a dwelling-house in the night, and there stealing the goods of one person, could not be afterwards indicted for the same breaking and entering, and stealing the goods of another person, appears to have been overruled in this case, when the authorities by which it was supposed to have been established were denied to be law. (e) It may be mentioned also that the statute 7 & 8 Geo. 4. c. 28. s. 3. enacts that no plea setting forth any attainder shall be pleaded in bar of any indictment, unless the attainder be for the same offence as that charged in the indictment.

Where, upon an indictment for a burglary and stealing goods, the prosecutor failed to prove any nocturnal breaking, or any larceny, subsequent to the time when the prisoners entered the house, which must have been after three o'clock in the afternoon of the day on which the offence was charged to have been committed; it was proposed to give evidence of a larceny by the prisoners, of some of the articles mentioned in the indictment, though committed before three o'clock on the day on which they were charged to have entered the house; but the court refused to receive the evidence. They said, that the charge contained in the indictment of burglariously breaking and entering the house, and stealing the goods, might unquestionably be modified, by shewing that the prisoners stole the goods without breaking open the house; but that the charge proposed to be introduced went to connect the prisoners with an antecedent felony committed before three o'clock on the day mentioned, at which time it was clear that they had not entered the house; that the transactions were distinct; and that it might as well be proposed to prove any felony which those prisoners might have committed in that house seven years before. (f)

Where a larceny, whether within or ousted of clergy, was charged in the same indictment with a burglary, it was holden that the prisoner might be found not guilty of the burglary, and convicted of the larceny. (g) Thus, where the prisoners were acquitted of the burglary, upon an indictment for a burglary and larceny, and found guilty of stealing in the dwelling-house to the amount of forty shillings, it was holden that they were excluded from their clergy, though there was no separate and distinct count in the indictment on the statute 12 Ann. c. 7.: (h) and the

(d) 2 East. P. C. c. 15. s. 29. p. 519. note (b).

(e) Viz. Turner's case, and the case of Jones and Beaver, *ante*, 40.

(f) Rex v. Vandercomb and Abbott, 2 Leach. 708.

(g) *Ante*, 38.

(h) Now repealed by 7 & 8 G. 4. c. 27.

Judges were of opinion that the indictment contained every charge that was necessary in an indictment upon that statute. (i)

In this case the finding of the jury was, "not guilty of breaking and entering the dwelling-house in the night, but guilty of stealing the box and money in the dwelling-house : " (j) upon which, part of the objection, on behalf of the prisoners, was, that they were not excluded from clergy, because the jury had acquitted them of the burglary. (k) And formerly it appears to have been doubted, whether, where the words "not guilty of the burglary" were a part of the finding of the jury, the prisoner was not by necessary consequence acquitted of the felony also. (l) But in a more recent case, where the indictment was for a burglary and larceny, and the verdict was "not guilty of the burglary, but guilty of stealing above the value of forty shillings in the dwelling-house ;" and the entry by the officer was in the same words ; the Judges, after some debate, and after adjourning the case to a subsequent term, held the finding sufficient to warrant a capital judgment. They agreed, that if the officer were to draw up the verdict in form, he must do it according to the plain sense and meaning of the jury ; and that the minute was only for his future direction. (m)

Not guilty of the burglary, but guilty of stealing above the value of 40 shillings in the dwelling-house.

It has been supposed, that upon an indictment against several persons for a burglary and larceny, the jury could not find one guilty of the burglary and another guilty of the larceny only, upon the same indictment, and the same evidence ; as such a finding would shew that the offences of the several prisoners were of a distinct nature, and therefore ought not to have been included in the same indictment. (n) But by the opinion of a majority of the Judges in a late case, it appears that upon an indictment for burglary and larceny against two, one may be found guilty of the burglary and larceny, and the other of the larceny only. Upon an indictment against Moss and two others for burglary and stealing in the dwelling-house to the value of forty shillings, Moss pleaded guilty to the whole, and the other two were found guilty of stealing in the dwelling-house to the amount of forty shillings, but acquitted of the burglary. A case was saved upon the question how the judgment should be entered, and seven of the judges thought that it might be entered against all the three prisoners ; against Moss for the burglary and capital larceny, and against the other two for the capital larceny : Burrough, J., and Hullock, B.,

Where several persons are indicted together, for burglary and larceny, the offence of some may be burglary, of the others only larceny.

(i) *Rex v. Withal and Overend*, *Gudford Ass.* 1772, *Hil. T.* 1774. 1 *Leach* 88.

(j) In the indictment the box was described as containing sixty pounds of money.

(k) *Rex v. Withal and Overend*, 1 *Leach* 88. 2 *East. P. C. c.* 15. s. 28. p. 517.

(l) *Comer's case*, 1744, 1 *Leach* 36. 2 *East. P. C. c.* 15. s. 28. p. 516.

(m) *Hungerford's case*, *Bristol*, 1790, *East. and Trin. T.* 1790, 2 *East. P. C. c.* 15. s. 28. p. 518. Many of the judges thought that an entry, "not guilty of the breaking and entering in the

"night, but guilty of the stealing, "&c." would be more correct. But it appeared upon inquiry to be the constant course on every circuit in England, upon an indictment for murder, where the party was only convicted of manslaughter, to enter the verdict "not guilty of murder, but guilty of manslaughter;" or, "not guilty of murder, but guilty of feloniously killing and slaying;" and yet murder includes the killing.

(n) *Rex v. Turner and others*, 1 *Sid.* 171. 2 *East. P. C. c.* 15. s. 28. p. 519.

thought otherwise, but Hullock, B., thought that if a *nolle prosequi* were entered as to Moss for the burglary, judgment might be entered against all the three for the capital larceny. The seven judges thought that there might be cases in which upon a joint larceny by several, the offence of one might be aggravated by burglary in him alone, because he might have broken the house in the night in the absence and without the knowledge of the others in order to come afterwards and effect the larceny, and the others might have joined in the larceny without knowing of the previous breaking. (o)

Punishment
of principal
offenders.

Burglary was at common law a felony within the benefit of clergy; (p) but a higher punishment was imposed by the provisions of several statutes now repealed. And the recent statute 7 & 8 Geo. 4. c. 29. s. 11. makes it a capital offence by enacting "that every person convicted of burglary shall suffer death as a felon." (q)

Principals in
the second
degree, and
accessories.

With respect to accessories, that statute also enacts "that in the case of every felony punishable under this act, every principal in the second degree, and every accessory before the fact shall be punishable with death, or otherwise in the same manner as the principal in the first degree is by this act punishable; and every accessory after the fact to any felony punishable under this act (except only a receiver of stolen property) shall on conviction be liable to be imprisoned for any term not exceeding two years."

Trial of acces-
sories.

The trial of accessories is now regulated by the statute 7 Geo. 4. c. 64. ss. 9, 10, 11., by which an accessory before the fact may be tried as such for a substantive felony, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice. It provides also, that such accessories, and also accessories after the fact, may be tried by any court which has jurisdiction to try the principal felon, although the offence be committed on the seas, or abroad; and that if the offence be committed in different counties, the accessory may be tried in either. And it also enacts that the accessory may be prosecuted after a conviction of the principal, although the principal be not attainted. (r)

(o) *Rex v. Butterworth and others*, Mich. T. 1823, MS. Bayley, J., and Russ. & Ry. 520.

(p) 3 Inst. 63, 65. 4 Black. Com. 228.

(q) See the stat. in the *Addenda* to

this Volume. Benefit of clergy was abolished by 7 & 8 Geo. 4. c. 28. s. 6. See also the *Addenda*.

(r) See this statute ss. 9, 10, and 11 in the *Addenda* to the first Volume.

CHAPTER THE SECOND.

OF SACRILEGE, OR OF BREAKING ANY CHURCH OR CHAPEL, AND STEALING THEREIN.

THE statutes 23 Hen. 8. c. 1., and 1 Edw. 6. c. 12. which related to this offence, are repealed by 7 & 8 G. 4. c. 27.

But the 7 & 8 G. 4. c. 29. s. 10. enacts, "That if any person
"shall break and enter any church or chapel, and steal therein
"any chattel, or having stolen any chattel in any church or chapel
"shall break out of the same, every such offender, being convicted
"thereof, shall suffer death as a felon." Capital of-
fence.

A larceny, therefore, committed in a church or chapel, accompanied with a breaking of such church or chapel is still a capital offence, but the provisions of the 1 Edw. 6. c. 12. which made the felonious taking of any goods out of a church or chapel a capital offence, though there was no breaking, are not re-enacted.

The words "any chattel," would probably be deemed to extend to articles in a church or chapel though not used for divine service. The words "any goods" in the repealed statute 1 Edw. 6. c. 12. were held not to be confined to goods used for divine service, but to extend to articles used in the church to keep it in proper order: and it was considered that such articles were under the protection of the statute, whilst the church was in a course of being repaired, if they had not been brought in merely for the purpose of such repairs. Whilst a church was being repaired, the prisoner stole from it a pot used to hold charcoal for airing the vaults, and a snatch-block used to raise weights if the bells wanted repair. These articles had been kept in the church for years, and were not brought in for the repairs which were then in progress. Upon a case reserved, the Judges (eleven of them being present) were unanimous that such goods were under the protection of the statute, and that a capital sentence ought to be passed upon the prisoner, as they thought that the violation of the sanctity of the place was what the statute was intended to prevent. (a)

It has been holden that where the bells, books, or other goods belonging to a church are stolen, they may be laid in the indictment to be the goods of the parishioners. (b) And it is said, Statement of
property.

(a) *Rex v. Rourke*, East. T. 1819. Hawk. P. C. c. 33. s. 45. 2 East P. C. MS. Bayley, J., Russ. & Ry. 386. c. 16. s. 69. p. 651.

(b) 1 Hale 512. 2 Hale 81. 1

that he who takes away the goods of a chapel or abbey, in time of vacation, may be indicted, in the first case, for stealing *bona capellæ*, being in the custody of such and such; and in the second, for stealing *bona domus vel ecclesiæ*, &c. (c)

Principals in
the second
degree, and
accessories.

Principals in the second degree, and accessories before the fact are punishable with death as the principals in the first degree, and accessories after the fact, (except receivers of stolen property) are liable to imprisonment for two years. (d) The proceedings for the trial of accessories are regulated by 7 G. 4. c. 64. s. 9, 10, 11. (e)

(c) 1 Hale 512. 2 Hale 81. 1 Hawk. P. C. c. 33. s. 45. 2 East P. C. c. 16. s. 69. p. 651. (d) 7 & 8 G. 4. c. 29. s. 61. *Addenda* to this volume. (e) See *Addenda* to the first volume.

CHAPTER THE THIRD.

OF HOUSE-BREAKING.

BESIDES the nocturnal house-breaking or burglary, which has been treated of in the first chapter of this book, the law of England, in its especial regard for the safety and security of the habitation of man, provided by several statutes, (*a*) that the forcible invasion of the dwelling-house of another, or house-breaking, when accompanied with felony, should be liable to capital punishment, though committed in the day-time.

The ancient statutes upon this subject have been repealed by 7 and 8 Geo. 4. c. 27. But the 7 and 8 Geo. 4. c. 29. s. 12. enacts "that if any person shall break and enter any dwelling-house, and steal therein any chattel, money, or valuable security, to any value whatever," every such offender being convicted thereof, shall suffer death as a felon.

The same act, by s. 13. provides and enacts, that no building, although within the same curtilage with the dwelling-house, shall be deemed to be part of such dwelling-house for the purpose of burglary, or for any of the purposes aforesaid, unless there shall be a communication between such building and dwelling-house, either immediate, or by means of a covered and enclosed passage leading from the one to the other.

Principals in the second degree, and accessories before the fact, are punishable with death as the principals in the first degree; and accessories after the fact (except receivers of stolen property) are liable to imprisonment for two years. (*b*) The proceedings for the trial, &c. of accessories, are regulated by 7 Geo. 4. c. 64. ss. 9, 10, 11. (*c*)

By analogy to the cases decided upon the repealed statutes, (*d*) it is conceived that such a breaking and entering as would, if committed in the night, constitute a burglary, will be necessary, in order to bring a case within this 12th section of the 7 and 8 Geo. 4. c. 29. And by the express words of the statute, the breaking and entering must be attended with some larceny, so that although a house be broken and entered in the day-time with a felonious

7 and 8 Geo. 4. c. 29. s. 12. Persons breaking and entering a dwelling-house and stealing, &c. shall suffer death. Does not extend to buildings within the curtilage.

Principals in the second degree and accessories.

Breaking and entering.

(*a*) 1 Edw. 6. c. 12. s. 10. 5 and 6 Edw. 6. c. 9. 39 Eliz. c. 15. 3 W. & M. c. 9.

(*b*) 7 and 8 Geo. 4. c. 29. s. 61. *Addenda* to this volume.

(*c*) See *Addenda* to the first volume.

(*d*) 1 Hale 522, 523, 526, 548. 2 Hale 352, 353. 1 Hawk. P. C. c. 34. ss. 2, 3. 2 Hawk. P. C. c. 33. s. 88, 92. Fost. 108. 2 East. P. C. c. 16. s. 68. p. 631. s. 72. p. 636. s. 75. p. 638.

intent, it will not be an offence within the statute if nothing be taken.

Dwelling-house.

It seems also that questions which may arise upon this statute as to which shall be deemed a *dwelling-house*, must be governed by the same rules as apply to similar questions in cases of burglary, keeping in mind the enactment before mentioned as to buildings within the curtilage. A chamber in one of the inns of court was held to be a dwelling-house within the repealed statute 39 Eliz. c. 15. (e)

(e) *Rex v. Evans and Fynche*, Cro. Car. 473.

CHAPTER THE FOURTH.

OF STEALING IN A DWELLING-HOUSE, ANY PERSON THEREIN BEING PUT IN FEAR.

THIS was a capital offence by the repealed statute 3 W. & M. c. 9. s. 1. (a) And the 7 & 8 G. 4. c. 29. s. 12. enacts that if any person shall steal any chattel, money, or valuable security to any value whatever in any dwelling-house, any person therein being put in fear, every such offender being convicted thereof shall suffer death as a felon. (b)

The thirteenth section of the act prevents any building, although within the same curtilage, from being deemed part of the dwelling-house, unless there be a communication between such building and dwelling-house, either immediate or by means of a covered and inclosed passage leading from the one to the other. And the observations in the preceding chapter, upon questions which may arise as to what shall be deemed a dwelling-house, will apply to the offence now under consideration. It is clear that no breaking of the house is necessary to constitute this offence: and it should seem that property might be considered as stolen in the dwelling-house within the meaning of the statute, if a delivery of it out of the house should be obtained by threats, or an assault upon the house by which some person therein should be put in fear. (c) But questions of difficulty may perhaps arise as to the degree of fear which must be excited by the thief.

The repealed statute 3 W. & M. c. 9. enacted that every person who should feloniously take away any goods or chattel being in any dwelling-house, the owner or any other person being therein and put in fear, should not have the benefit of clergy. It does not appear to have been expressly decided upon that statute whether or not it was necessary to prove the actual sensation of fear felt by some person in the house, or whether fear was to be implied, if some person in the house were conscious of the fact at the time of the robbery. But it was suggested as the better opinion, and was said to have been the practice, that proof should be given of an actual fear excited by the fact when committed out of the presence of the party, so as not to amount to a robbery at

The putting in fear.

(a) Repealed by 7 & 8 G. 4. c. 27.

(c) See Burglary, *ante*, 8. and 2

(b) See the section of the statute in East. P. C. c. 16. s. 55. p. 623. the *Addenda*.

common law. (d) And it was observed that where the fact was committed in the presence of the party, possibly it would depend upon the particular circumstances of the transaction, whether fear would or would not be implied: but that clearly if it should appear that the party in whose presence the property was taken was not conscious of the fact at the time, the case was not within that statute. (e)

Indictment.

It was decided upon the same repealed statute that the indictment must expressly allege that some person in the house was put in fear by the prisoner. The form was (after stating a stealing of goods in the dwelling-house of one J. G.,) "he the said J. G., and one M. E., and one M. G., the wife of the said J. G., then being in the said dwelling-house, and being put in fear therein;" and, on the first consideration of the case, most of the Judges, to whom it was referred, inclined to think that the indictment was good, in pursuing the words of the statute; but they ultimately agreed that the prisoners were entitled to their clergy for the defect in the indictment, in not stating that the persons in the house were put in fear *by the prisoners*. (f)

But in this case the Judges held, that the prisoners were properly convicted of the larceny; and they accordingly received sentence of transportation. (g)

Principals in the second degree and accessories.

The enactments respecting principals in the second degree and accessories mentioned in the preceding chapter apply also to the present offence.

(d) 2 East. P. C. c. 16. s. 71. p. 635. *Rex v. Etherington and Brook, id. ibid.*

(e) *Id. ibid.*

(f) *Rex v. Etherington and Brook*, 2 Leach 671. 2 East. P. C. c. 16. s. 71. p. 635, in which last authority it is said, that the Judges came to their conclusion, upon being referred to some precedents of indictments for

burglary, in which, to oust the offenders of their clergy in case of their standing mute or challenging more than twenty, they were charged with putting persons in fear who were in the houses, (within 1 Edw. 6. c. 12.) and also to some other books and precedents.

(g) 2 Leach 673.

CHAPTER THE FIFTH.

OF STEALING IN A DWELLING-HOUSE TO THE VALUE OF 5*l.* OR MORE.

THE statute 7 & 8 G. 4. c. 29. s. 12. enacts "that if any person 7 & 8 G. 4. c. 29. s. 12.
 " shall steal in any dwelling-house any chattel, money, or valua-
 " ble security to the value in the whole of five pounds or more,
 " every such offender being convicted thereof shall suffer death as
 " a felon."

According to the construction put upon the repealed statute 12 Dwelling-house.
 Ann. c. 7. (which related to a stealing of this kind to the value of
 forty shillings) the dwelling-house must be one in which burglary
 might be committed. (a) But with respect to buildings within the
 curtilage, the thirteenth section of the 7 & 8 G. 4. enacts, that no
 building, although within the same curtilage with the dwelling-
 house and occupied therewith, shall be deemed to be part of such
 dwelling-house, for the purposes of burglary, or for any of the
 purposes aforesaid, unless there shall be a communication be-
 tween such building and dwelling-house, either immediate or by
 means of a covered and inclosed passage leading from the one to
 the other.

The repealed statute of 12 Ann. ousted of clergy every person
 who should feloniously steal any money, goods, &c. of the value
 of forty shillings or more, *being in any dwelling-house*; the re-
 cent statute enacts that if any person shall *steal in any dwelling-*
house any chattel, &c.; but possibly it will be construed upon the
 same principle, and be considered as intended to give greater se-
 curity only to property deposited in a house, so as to be under the
 protection of the house, and not to property about the person of
 the party from whom it is stolen. It may be useful, therefore, to
 notice some of the cases decided upon the repealed statute. It
 was decided upon that statute that its provisions did not extend to
 a stealing in a man's own house; on the ground that the statute
 was not intended to protect property which might happen to be in
 a house from the owner of the house, but from the depredations
 of others. (b) And, upon the same principle, where it appeared

(a) 2 East. P. C. c. 16. s. 81. p. 644. (b) Rex v. Thompson and Macda-
 Davies's *alias* Silk's case, *ante*, 17; niel, O. B. 1784. 1 Leach 338. 2
 and other cases cited in the Chapter East. P. C. c. 16. s. 81. p. 644.
 on *Burglary*, *ante*, 12, *et sequ.*

that the prisoner was a married woman and had stolen the property in the dwelling-house of her husband, it was holden that she could not be convicted of the capital part of the charge, as the house of the husband must be construed to be her house also: and she was therefore found guilty only of the simple larceny. (c) But a lodger who invited a man to his room, and there stole his goods to the value of forty shillings when not about his person, was holden liable to be found guilty of stealing in the dwelling-house under that statute; the goods of a lodger's guest being under the protection of the dwelling-house. The prisoner lodged at Wakefield's, and having invited the prosecutor to sleep in his room, stole the prosecutor's watch whilst it was hanging at the bed's head; and he was convicted of stealing to the value of forty shillings in the dwelling-house of Wakefield. Upon a case reserved seven Judges against three held the conviction right. (d) And property left at a house and delivered to the occupier under the supposition that it was for one of the persons in the house, was considered to be entitled to the protection of the house, and the stealing of it to the value of forty shillings to be within that statute. Two boxes belonging to a Mrs. Douglas, who lodged at 38 in Rupert Street, were delivered at No. 33 in the same street where the prisoner lodged, by a porter from the Green Man and Still, (but whether by accident or collusion with the prisoner was not proved, as the porter, though called upon his recognizance, did not appear), and the occupier of the house No. 33 took them in and paid the portage, supposing them to be for the prisoner, whose name she did not know as he had recently taken his lodging with her. Shortly afterwards when the prisoner came she told him of the arrival of the boxes, and of the portage she had paid, when he said it was all right and he would pay her again. The boxes were put into his room, and he went out two or three times in the course of the evening, carrying bundles each time, and when he went out the last time he did not return again. The boxes were found entirely ransacked. The jury found the prisoner guilty, but upon a doubt whether these goods were sufficiently *under the protection of the house* to bring the case within the statute, the point was submitted to the consideration of the Judges, who held that the goods were under the protection of the dwelling-house, and that the capital conviction was therefore proper. (e)

In a case upon the same statute where the indictment was for stealing a bank-note of the value of 25*l.*, in the dwelling-house of one C. M. Adams, it appeared that the prisoner was a lodger in Mrs. Adams's house, and that, on the day on which the offence was committed, she, wanting to get the note changed, sent her servant with it to his apartments, to request him to give her change for it; when the prisoner, after examining his purse, and

(c) Gould's case, O. B. 1780. 1 Leach 217. 2 East. P. C. c. 16. s. 81. p. 644, in which last book it is said, that the prisoner was the mistress of a brothel, and stole the money from a

sailor who lodged in her husband's house.

(d) Rex v. Taylor, East. T. 1820. MS. Bayley, J., and Russ. & Ry. 418.

(e) Rex v. Carroll, East. T. 1825. Ry. & Mood. C. C. 89.

saying that he had not gold enough about him for the purpose, but that he would go to his bankers and get it changed, left the house with the note in his hand, and never returned. Upon these facts a question arose, whether the case was within the statute, which was considered as having been made to protect such property as might be *deposited in the house*, and not property which was on the person of the party: and the point having been saved for the opinion of the Judges, they were of opinion that the case was not within that statute. (e) And, upon the same principle, where a person, in possession of a large sum of money, was deluded by a ring-dropper, who pretended to have found a purse, to go into a public-house to share its contents, and there induced to lay his money on the table, when the ring-dropper immediately took up the money, and carried it off, it was decided, upon reference to the Judges, that the case was not within that statute. A majority of them were of opinion that, in order to bring a case within that statute, the property stolen must be under the protection of the house, and deposited therein for safe custody, as the furniture, plate, or money kept in the house, and not things immediately under the eye, or personal care of some one who happened to be in the house. (f)

Another point was decided upon the statute of Anne, namely, that it was necessary the stealing should be to the amount of forty shillings *at one time*; it being a rule that a number of distinct grand larcenies cannot be added together, so as to constitute a capital offence. Thus, where the evidence was that the prisoner was the servant of the prosecutor, and had, at different times, purloined his master's property to a very considerable amount, but it did not appear that he had ever taken to the amount of forty shillings at any one particular time; the court held that the case was not within the statute. They said, that the property must be stolen to the amount of forty shillings at one and the same time; and that the several values of different portions of property, stolen at different times, could not be added together for the purpose of making the offence capital, they being in fact different and independent acts of stealing. (g) But where property was stolen at one time to the amount of forty shillings, and a part of it only, not amounting to forty shillings, was found upon the prisoner, and produced at the trial, the court left it to the jury to say whether the prisoner had not stolen the rest of the things which the prosecutor lost, as well as those which had been produced. (h)

Stealing to the amount mentioned in the statute at one time.

As in cases of burglary, so in indictments for this offence, the

(e) Campbell's case, O. B. Jan. 1792. 2 Leach 564. 2 East. P. C. c. 16. s. 82. p. 644, 645.

(f) Owen's case, O. B. 1792. 1 Hawk. P. C. c. 36. *Of Larceny from the Dwelling-house*, s. 6. 2 Leach 572. 2 East. P. C. c. 16. s. 82. p. 645. And the same point was again decided in Castledine's case, O. B. Oct. 1792, which was also referred to the Judges;

and again in Watson's case, O. B. 1794. See 2 Leach 574, note (a). 2 Leach 640. 2 East. P. C. c. 16. s. 82. p. 645, 646, and s. 107. p. 680, 681.

(g) Petrie's case, 1 Leach 294.

(h) Hamilton's case, 1 Leach 348. The jury found the prisoner guilty of stealing goods in the dwelling-house to the value of forty shillings.

The indictment must state the name of the owner of the house correctly.

name of the owner of the house should be correctly stated in the indictment; as a material variance in this respect will be fatal to the capital part of the charge. Thus, where an indictment upon the statute of Anne stated the dwelling-house to belong to one *John Snoxall*, and upon the evidence it appeared that it was not his house; it was holden that the prisoner could not be convicted upon that statute: (i) and it was holden to be a variance fatal to the capital part of an indictment upon the same statute where the house was stated to belong to *Sarah Lunns*, and it appeared on the evidence that the proper name was *Sarah London*. (k)

In this, as in most other offences, any one of several persons may be found guilty upon an indictment charging them with a joint offence. But they cannot be found guilty separately of separate parts of the charge, and if they be so found guilty separately, a pardon must be obtained, or *nolle prosequi* entered, as to the one who stands second upon the verdict, before judgment can be given against the other. Thus, where two persons, *Hempstead* and *Hudson*, were indicted upon the statute of Anne for stealing in the dwelling-house to the value of 6*l.* 10*s.* and the jury found *Hempstead* guilty as to part of the articles of the value of 6*l.* and *Hudson* guilty as to the residue; the Judges (upon a case reserved) held that judgment could not be given against both, but that upon a pardon or *nolle prosequi*, as to *Hudson*, it might be given against *Hempstead*. (l)

A prisoner indicted for burglary, &c. found guilty upon the statute of 12 Anne.

Where a prisoner was indicted for robbery in a house, or burglary and stealing of goods, and the evidence proved a larceny committed in the dwelling-house to the amount of forty shillings; it was held that he might be acquitted of the robbery and burglary, and found guilty upon the statute of Anne, although there was no special count upon the statute in the indictment. (m)

Principals in the second degree, and accessories.

Principals in the second degree, and accessories before the fact, are punishable with death, as the principals in the first degree; and accessories after the fact (except receivers of stolen property) are liable to imprisonment for two years. (n) The proceedings for the trial of accessories are regulated by 7 Geo. 4. c. 64. ss. 9, 10, 11. (o)

(i) *White's case*, 1 Leach 252, *ante*, 37.

(k) *Woodward's case*, 1 Leach 253, note (a), and see other cases, *ante*, 37.

(l) *Rex v. Hempstead*, M. T. 1817.

MS. Bayley J., and Russ. & Ry. 344.

(m) 1 Hawk. P. C. c. 36. *Of Larceny from the Dwelling-house*, s. 3.

(n) 7 and 8 Geo. 4. c. 29. s. 61. See the *Addenda*.

(o) See *Addenda* to the first volume.

CHAPTER THE SIXTH.

OF BREAKING, &c. AND STEALING IN A BUILDING WITHIN THE CURTILAGE.

THE statute 7 & 8 Geo. 4. c. 29., after providing (by s. 13.) that no building, although within the same curtilage with the dwelling-house, and occupied therewith, shall be deemed to be part of such dwelling-house for the purpose of burglary, or for any of the purposes before-mentioned in the act, unless there shall be a communication between such building and dwelling-house, either immediate, or by means of a covered and enclosed passage leading from the one to the other, contains the following enactment. By the fourteenth section it is enacted, “That if any person shall break 7 & 8 G. 4. c. 29. s. 14.
 “and enter any building, and steal therein any chattel, money, or
 “valuable security, such building being within the curtilage of a
 “dwelling-house, and occupied therewith, but not being part
 “thereof, according to the provision hereinbefore mentioned,
 “every such offender being convicted thereof, either upon an
 “indictment for the same offence, or upon an indictment for
 “burglary, house-breaking, or stealing to the value of five pounds
 “in a dwelling-house, containing a separate count for such offence,
 “shall be liable, at the discretion of the court, to be transported
 “beyond the seas for life, or for any term not less than seven
 “years, or to be imprisoned for any term not exceeding four
 “years, and, if a male, to be once, twice, or thrice publicly or pri-
 “vately whipped, (if the court shall so think fit), in addition to
 “such imprisonment.”

By s. 61., principals in the second degree, and accessories before the fact are punishable in the same manner as principals in the first degree, and accessories after the fact, (except receivers,) are liable to imprisonment for any term not exceeding two years. (a)

This enactment, specifying as it does in express terms a building within the *curtilage* of a dwelling-house, appears not to apply to many of those buildings and outhouses, which although not within any common inclosure or curtilage, were deemed by the

(a) The proceedings for the trial of accessories are regulated by 7 G. 4. c. 64. ss. 9, 10, 11.

old law of burglary, *parcel* of the dwelling-house, from their adjoining to such dwelling-house, and being in the same occupation. The enquiry under this provision of the statute will be simply whether the building in question is within the curtilage or homestall; but it may be useful to refer to some of the points formerly decided in cases of burglary, in which it became material to consider whether particular buildings were parcel of a dwelling-house, and the circumstance of their being situated within a common inclosure appears to have been treated as a material ingredient. It should be observed, however, that in several of these cases the particular buildings might possibly have been held to be *parcel* of the dwelling-house independently of that circumstance.

Cases in which particular buildings were held to be parcel of a dwelling-house.

In a case where the prisoner had broken into a goose-house which opened into the prosecutor's yard, into which yard the prosecutor's house also opened, and the yard was surrounded partly by other buildings of the homestead, and partly by a wall, some of which buildings had doors opening backwards, as well as doors opening into the yard, and there was a gate in one part of the wall opening upon a road, the Judges held that the goose-house was parcel of the dwelling-house. (*b*)

In another case, the prosecutor's house was at the corner of a street, and adjoining thereto was a workshop, beyond which a stable and coach-house adjoined; all were used with the house, and had doors opening into a yard belonging to the house, which yard was surrounded by adjoining buildings, &c. so as to be altogether an enclosed yard: the workshop had no internal communication with the house, and it had a door opening into the street, and its roof was higher than that of the dwelling-house; The street door of the workshop was broken open in the night; and upon an indictment for burglary, the question arose, whether the workshop was parcel of the dwelling-house; and upon a case reserved, the Judges were unanimous that it was. (*c*) And it was holden, that an outhouse in the yard of a dwelling-house was parcel of the dwelling-house, the yard being inclosed, although the occupier had another dwelling-house opening into the yard, and had let such other dwelling-house with certain easements in the yard; the two houses having been originally in one. The prosecutor had in one range of buildings a house which he occupied, a house which he let, and a warehouse; all of which opened into a yard which was surrounded by a wall, gates, and buildings: the tenant of the second house had certain easements in the yard, and his house was between the prosecutor's house and the warehouse, and the two houses had formerly been in one. The prisoner was convicted of burglary in breaking into the warehouse, and a case was reserved upon the question, whether such warehouse could be deemed part of the prosecutor's house; and the Judges (nine of them being present) were of opinion that the warehouse was part of the prosecutor's house; it was so before

(*b*) *Rex v. Clayburn and another*, East. T. 1817. MS. Bayley, J., and East. T. 1818. Russ. & Ry. 360. Russ. & Ry. 334.; and see *Rex v.*
 (*c*) *Rex v. Chalkling and another*, Lithgo, Russ. & Ry. 357.

the house was divided, and it remained so notwithstanding the division; and they held the conviction right. (d)

It should seem that a building which was not any parcel of a dwelling-house, by the old law of burglary, cannot be considered as a building within the curtilage under the recent statute. It will be material therefore to attend to the connection of the curtilage with some dwelling-house in which burglary might have been committed. And we have seen that, by the express provision of the statute, the building within the curtilage must be occupied with the dwelling-house. (e)

It was holden that burglary could not be committed by breaking into a centre building used for purposes of trade, but having no internal communication with the dwelling-houses which formed the wings. The building was stated, in the first count of the indictment, as the dwelling-house of M. R. Boulton; in the second, as the dwelling-house of John Bush; and in the third, as the dwelling-house of William Nelson. It appeared, upon the evidence, that the place broken into was a centre building, having two wings; that in such centre building an extensive business was carried on, relating to different manufactories in which one Matthew Boulton was concerned with M. R. Boulton, William Nelson, and several other persons; and also relating to two other manufactories in which Matthew Boulton was concerned on his own account: that in part of one of the wings was the dwelling-house of M. R. Boulton, and in the other part of the same wing, the dwelling-house of John Bush, mentioned in the second count of the indictment, who was a workman of Matthew Boulton's; but that neither of such dwelling-houses had any internal communication with the centre building, except only, in the one occupied by John Bush, a window, which looked into a passage that ran the whole length of the centre building; and that in the other wing was the dwelling-house of William Nelson, which also had no internal communication with the centre building. It also appeared that in the front of this building there was a terrace or front yard, fenced round in different ways, and at the end of the pile of building, by a wall, with gates for horses and carriages, and a door for foot passengers: that the prisoners entered by a door in the front yard, through which they went along the front of the building, and round it into another yard behind it, called the middle yard; from thence, through a door which had been left open, up a staircase in the centre building, where they broke open some of the rooms; having so entered the premises, by the assistance of a servant of Matthew Boulton's, who acted as an accomplice for the purpose of effecting the apprehension of the prisoners. Upon this case being reserved for the consideration of the Judges, they all agreed that the prisoners were not guilty of burglary; and the grounds upon which they so decided are stated to have been, that the centre building, being a place for carrying on a variety of trades, and having no internal communication with the adjoining houses, could not be considered as part

Centre building used for purposes of trade, but having no communication with the dwelling-houses which formed the wings.

(d) *Rex v. Walters and others*, East. Mood. Cr. Cas. 13.
T. 1824. MS. Bayley, J., and Ry. &

(e) *Ante* p. 55.

Factory and dwelling-house with an internal communication, the factory being used partly for the separate business of the occupier of the dwelling-house, and partly for a business in which he had a partner.

of any dwelling-house; and that it was not to be considered as under the same roof as the houses adjoining, though the roof of it had a connexion with the roofs of the houses. (*f*)

But where there was an internal communication between a factory and the dwelling-house by means of an open passage only, the factory, being within the same fence as the dwelling-house, and used with it, was held to be parcel of the dwelling-house; although it was used partly for the separate business of the occupier of the dwelling-house, and partly for a business in which he had a partner. The premises were surrounded by a garden wall, the front wall of the factory, and the wall and gate of the stable yard; they were of the extent of rather more than an acre, and the house was in the centre; there was no other communication between the house and the factory than by an open passage inside the walls. In the factory the prosecutor, the occupier of the dwelling-house, carried on one business of his own, and another jointly with a partner, who lived elsewhere; and the rooms over the factory were used for the joint as well as the separate business. These rooms were broken into, and part of the separate property of the prosecutor, and also part of the joint property was stolen; and upon an indictment for burglary in the dwelling-house of the prosecutor, and after conviction, a case being reserved, the Judges held that these rooms were part of the prosecutor's dwelling-house, and that the conviction was right. (*g*)

Outhouse holden under a distinct title from the dwelling-house.

It was said upon the old law of burglary, that if a man took a lease of a dwelling-house from A., and of a barn from B., such barn would be no parcel of the dwelling-house, and not therefore a place in which burglary could be committed; (*h*) a position leading to the inference, that no outhouse, holden under a distinct title from the dwelling-house, could be the subject of burglary. But upon this it was observed, that the circumstance of an outbuilding being enjoyed by the occupier under a different title from his dwelling-house, seemed a very unsatisfactory reason of itself for excluding it from the same protection, if it were within the curtilage, or under the same roof, and actually enjoyed as parcel of the dwelling-house in point of fact, and under such circumstances as would, apart from the difference of title, constitute it parcel of the mansion in point of law. (*i*)

Outward fence of curtilage not opening into a building.

A door, wall, or other fence forming part of the outward fence of the curtilage, and opening into no building, but into the yard only, was held not to be such a part of the dwelling-house as that the breaking thereof would constitute burglary; and it was held to make no difference that the door broken was the entrance to a covered gateway, and that some of the buildings belonging to the dwelling-house, and within the curtilage, were over the gateway, and that there was a hole in the ceiling of the gateway for taking up goods into the building above. The prosecutor had a dwelling-house, warehouses, and other buildings, and a yard; the entrance

(*f*) *Rex v. Egginton and others*, 2 Leach, 913. 2 East. P. C. c. 15. s. 10. p. 494. 2 Bos. & Pul. 508.

MS. Bayley, J., and Russ. & Ry. 170.

(*h*) 1 Hale 559.

(*i*) 2 East. P. C. c. 15. s. 10. p. 494.

(*g*) *Rex v. Hancock*, East. T. 1810, And see *ante*, 15, 16.

into the yard was through a pair of gates which opened into a covered way ; over this way were some of the warehouses, and there was a loop-hole and crane over the gates to admit of goods being craned up ; and there was also a trap door in the roof of the covered way ; there was free communication from the warehouses to the dwelling-house : the prisoners broke open the gates in the night with intent to steal, and entered the yard, but did not enter any of the buildings ; and, upon a case reserved, the Judges were unanimous that the outward fence of the curtilage, not opening into any of the buildings, was no part of the dwelling-house, and the prisoners were discharged. (*k*) So an area gate opening into the area only is not such part of the dwelling-house, that the breaking of the gate will be burglary, if there be any door or fastening to prevent persons in the area from entering the house, although such door or other fastening may not be secured at the time. The prisoners opened an area gate in a street in London, and entered the house through a door in the area which happened to be open, but which was always fastened when the family went to bed, and was one of the ordinary barriers against thieves. Having stolen in the house to the value only of thirty-nine shillings, a question was made whether the breaking the area gate was breaking the dwelling-house so as to constitute burglary, and as there was no free passage in time of sleep from the area into the house, the Judges held unanimously that the breaking was not a breaking of the dwelling-house. (*l*)

(*k*) *Rex v. Bennett and another*, Hil. T. 1815, MS. Bayley, J., and Russ. & Ry. 289.

(*l*) *Rex v. Davis and another*, Hil. T. 1817, MS. Bayley, J., and Russ. & Ry. 322.

CHAPTER THE SEVENTH.

OF BREAKING, &C. AND STEALING IN ANY SHOP, WAREHOUSE, OR COUNTING-HOUSE.

Punishment.

THE 7 and 8 Geo. 4. c. 29. s. 15. enacts, "that if any person shall break and enter any shop, warehouse, or counting-house, and steal therein any chattel, money, or valuable security, every such offender, being convicted thereof, shall be liable to any of the punishments which the court may award as hereinbefore last mentioned." By the clause here referred to (s. 14.) the offender is liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit) in addition to such imprisonment.

Principals in the second degree and accessories.

Principals in the second degree, and accessories before the fact, are punishable in the same manner as principals in the first degree: and accessories after the fact (except receivers) are liable to be imprisoned for any time not exceeding two years. (a)

(a) See the Act, s. 61., *Addenda* to this volume. As to the proceedings for the trial, &c. of accessories, see 7 Geo. 4. c. 64. ss. 9, 10, 11. *Addenda* to the first volume.

CHAPTER THE EIGHTH.

OF ROBBERY FROM THE PERSON.

ROBBERY from the person appears to be well defined as "a felonious taking of money or goods of any value from the person of another, or in his presence, against his will, by violence, or putting him in fear." (a) Definition of the offence.

This offence is subject to capital punishment. The 7 & 8 Geo. 4. c. 29. s. 6. enacts, "that if any person shall rob any other person of any chattel, money, or valuable security, every such offender, being convicted thereof, shall suffer death as a felon." And by the general provisions of s. 61. principals in the second degree, and accessories before the fact, are punishable with death as the principals in the first degree and accessories after the fact (except receivers of stolen property) are liable to imprisonment for two years. (b) 7 & 8 Geo. 4. c. 29. s. 6.

This statute provides also for the punishment of offenders who steal from the person, under circumstances which do not amount to robbery. (c) It also enacts, "that if any person shall assault any other person with intent to rob him, or shall with menaces or by force demand any such property of any other person with intent to steal the same, every such offender shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit) in addition to such imprisonment." The statute has been passed since the publication of the first volume of this work, or this enactment would have been introduced in the section upon aggravated assaults. (d)

An important provision is contained in the 7th section of the 7 & 8 Geo. 4. c. 29. which declares and enacts "that if any person shall accuse, or threaten to accuse any other person of any infamous crime as thereafter defined, with a view or in- Robbery by threats.

(a) 2 East. P. C. c. 16. s. 124. p. 707. Hickman's case, 1 Leach 280. Addenda to first volume.

(b) 4 Black. Com. 243. 1 Hawk. P. C. c. 34. 1 Hale 532. 3 Inst. 68. (c) Post Chapter, Of Stealing from the Person.

(d) See the stat. in the Addenda; and as to proceedings against accesso- (d) Ante, vol. 1. p. 616.

"tent to extort or gain from him, and shall, by intimidating him
 "by such accusation or threat, extort or gain from him any chat-
 "tel, money, or valuable security, every such offender shall be
 "deemed guilty of robbery, and shall be indicted and punished
 "accordingly."

The statute then provides for the punishment of persons sending threatening letters, or threatening to make accusations with a view to extort money, &c. which enactment will be noticed in a subsequent part of this work. (e) It then proceeds to define what shall be deemed an infamous crime. The 9th section is in these words: "And for defining what shall be an infamous crime within the meaning of this act, be it enacted, that the abominable crime of buggery, committed either with mankind or with beast, and every assault with intent to commit the said abominable crime, and every attempt or endeavour to commit the said abominable crime, and every solicitation, persuasion, promise, or threat, offered or made to any person, whereby to move or induce such person to commit or permit the said abominable crime, shall be deemed to be an infamous crime, within the meaning of this act."

Recurring to the foregoing definition of this offence, and keeping in mind that robbery is an aggravated species of larceny, (f) we may inquire, first, as to the felonious taking; secondly, as to the taking against the will of the party; and, thirdly, as to the violence, or putting in fear.

1. As to the felonious taking.

Of the felonious taking. Amount of the value of the property immaterial.

The taking may be of money or goods "of any value." The value therefore, of the property taken is quite immaterial: a penny as well as a pound, forcibly extorted, makes a robbery; the gist of the offence being the force and terror. (g) But something must be taken, and it must be of some value; (h) otherwise the offence will be only that of an assault with intent to rob. (i)

But it must be of some value, and taken from the peaceable possession of the owner.

The property taken must not only be of some value, but it must be taken from the peaceable possession of the owner. In a case where the prisoner had obtained a note of hand from a gentleman by threatening with a knife held to his throat to take away his life; and it appeared that she had furnished the paper and ink with which it was written, and that the paper was never out of her possession; it was holden not to be robbery. The Judges were of opinion that the note was of no value; that as the legislature at the time of passing the statute 2 Geo. 2. c. 5. s. 3., whereby the stealing a chose in action was made felony, could not possibly have a case like this in contemplation, it was not within that act of parliament; that the note did not, on the face of it, import either a general or a special property in the prosecutor;

(e) *Post.* Book 5. Of Threats, &c.

(f) *Peat's case.* 1 Leach 228. *Lapier's case.* 1 Leach 321. It was formerly excluded from clergy by the enactments of several statutes, viz. 23 H. 8. c. 1. s. 3. 1 Edw. 6. c. 12. s. 10. 3 W. & M. c. 9. s. 1. and as to accessories before the fact, 4 and 5 Ph. &

M. c. 4. s. 1.

(g) 3 Inst. 69. 1 Hale 532. 1 Hawk. P. C. c. 34. s. 16. 4 Black. Com. 243. 2 East. P. C. c. 16. s. 125. p. 707.

(h) *Phipoe's case*, 2 Leach 673, 680.

(i) *Ante*, 61.

and that it was so far from being of any the least value to him, that he had not even the property of the paper on which it was written, as it appeared that both the paper and ink were the property of the prisoner, and the delivery of it by her to the prosecutor could not, under the circumstances, be considered as vesting it in him; but that if it had, as it was a property of which he was never, even for an instant, in the peaceable possession, it could not be considered as property taken from his person, so as to constitute the crime of robbery. (*j*)

By the "taking," necessary in this offence, is implied that the robber must be in *possession* of the thing taken. So that if a man, having a purse fastened to his girdle, be assaulted by a thief, and the thief, in order the more easily to take the purse, cut the girdle, and the purse thereby fall to the ground, this is no taking; for the thief never had the purse in his possession. (*k*) And, upon the same principle, in a case where it appeared that the prisoner stopped the prosecutor as he was carrying a feather-bed on his shoulders, and told him to lay it down or he would shoot him, and the prosecutor accordingly laid the bed on the ground, but the prisoner was apprehended before he could take it up so as to remove it from the spot where it lay; the Judges were of opinion that the offence of robbery was not completed. (*l*) But if in the former case the thief had taken up the purse from the ground, and afterwards let it fall in the struggle, this would have been a taking, though he had never taken it up again; for the purse would have been once in his possession. (*m*) And it is not necessary that the property should continue in the possession of the thief. Thus, where a robber took a purse of money from a gentleman, and returned it to him immediately, saying, "If you value your purse, you will please to take it back, and give me the contents of it;" but was apprehended and secured before the gentleman had time to give him the contents of the purse; the court held that there was a *sufficient taking* to complete the offence, although the prisoner's possession continued only for an instant. (*n*) And in a case where, while a lady was stepping into her carriage, the prisoner snatched at her diamond ear-ring, and separated it from her ear by tearing the ear entirely through; but there was no proof of the ear-ring ever having been seen in his hand, and, upon the lady's arrival at home, it was found amongst the curls of her hair; the Judges, upon the case being submitted for their consideration, were all of opinion, that there was a *sufficient taking* from the person to constitute robbery. They thought that it was sufficient, as the ear-ring was in the possession of the prisoner separate from the lady's person, though but for a moment, and though he could not retain it, but probably lost it again the same instant. (*o*) It should, however, be observed, with respect to cases of this de-

The taking must be such as to give the robber a *possession* of the thing taken.

(*j*) *Phipoe's case*, 2 Leach 673. The form of the note was—"Two months after date I promise so pay to Miss Maria Theresa Phipoe, or order, the sum of two thousand pounds sterling, for value received.—John Courtloy, Oxendon-street."

(*k*) 3 Inst. 69. 1 Hale 533.

(*l*) *Farrell's case*, O. B. 1787, 1 Leach 322, note (*b*).

(*m*) 3 Inst. 69. 1 Hale 533.

(*n*) *Peat's case*, 1 Leach 223.

(*o*) *Lapier's case*, 1 Leach 320.

scription, that though it may have been formerly holden that a sudden taking or snatching of any property from a person unawares was sufficient, the contrary doctrine appears to be now established; and that no taking by violence will, at the present day, be considered as sufficient to constitute robbery, unless some injury be done to the person, as in the case last cited, or unless there be some previous struggle for the possession of the property, or some force used to obtain it. (*p*)

Where the offence of robbery is once actually completed by taking the property of another into the possession of the thief, it cannot be purged by any subsequent re-delivery. (*q*) Thus, if A. requires B. to deliver his purse, and he delivers it accordingly, when A., finding only two shillings in it, gives it him again, yet this is a *taking* by robbery. (*r*)

There may be a taking in law.

Not only a taking in fact, but a taking in law, is sufficient to constitute a robbery. (*s*) It has therefore been holden, that if thieves attack a man to rob him, and, finding little or nothing about him, force him by menace of death to swear to fetch them money, which he does accordingly, and delivers it to them while the fear of the menace still continues upon him, and they receive it, this is a sufficient taking in law. (*t*) And if upon A. assaulting B., and bidding him to deliver his purse, B. refuse to do so, and then A. pray B. to give or lend him money, and B. does so accordingly under the influence of fear, the taking will be complete. (*u*) For where the thief receives money, &c. by the delivery of the party, either while the party is under the terror of an actual assault, or afterwards while the fear of menaces made use of by the thief continues upon him, such thief may, in the eye of the law, as correctly be said to take the property from the party, as if he had actually taken it out of his pocket. (*v*)

But there must be the *animus furandi*, or felonious intent.

The taking must in all cases be accompanied with a felonious intent, or *animus furandi*: but if a man *animo furandi* say—"Give me your money,"—"Lend me your money,"—"Make me a present of your money," or words of the like import, they are equivalent to the most positive order or demand; and, if any thing be obtained in consequence, such a taking will be within the definition of robbery. (*x*) There is, however, a case of considerable nicety, which should be here noticed, where, though the original assault was clearly with a felonious intent, the taking of the goods was holden to be no more than a trespass. A. assaulted B. on the highway with a felonious intent, and searched the pockets of B. for money; but, finding none, he pulled off the bridle of B.'s

(*p*) Macauley's case, O. B. 1783, 1 Leach 287. Baker's case, O. B. 1783, *id.* 291. Horner's case, O. B. 1790. 2 East. P. C. c. 16. s. 121. p. 703. *post.* 68. Rex v. Mason, Mich. T. 1820, *post.* 68.

(*q*) 1 Hawk. P. C. c. 34. s. 2.

(*r*) 1 Hale 533.

(*s*) 3 Inst. 68. 1 Hale 532.

(*t*) *Id. Ibid.* 2 East. P. C. c. 16. s. 129. p. 714.

(*u*) 1 Hale 533.

(*v*) 2 East. P. C. c. 16. s. 128. p. 711. s. 129. p. 714. And see further as to cases of this kind, *post.* 71, *et sequ.* where "the putting in fear" is spoken of.

(*x*) By Willes, J. delivering the opinion of the Judges in Donally's case, 1 Leach 196. And see further upon the subject of the felonious intent, *post.* 67, *et sequ.* in the cases relating to "violence or putting in fear," and *post.* in the Chapter on *Larceny*.

horse, and threw that and some bread which B. had in pannels about the highway, but did not take any thing from B.; and it was resolved, upon a conference with all the Judges, that this was not robbery, because nothing was taken from B. (y) But it is remarked upon this case, that the better reason for the decision seems to be, that the particular goods were not taken with a felonious intent, as surely there was a sufficient taking and separation of the goods from the person. (z)

Some questions as to the felonious intent have arisen where the property has been taken under colour of a purchase. Thus, though it is clear that if a person by force, or threats, compel another to give him goods, and by way of colour oblige him to take, or if he offer less than the value, it is robbery: (a) yet it has been doubted, whether the forcing a higler or other chapman to sell his wares, and giving him the full value of them, amounts to so heinous a crime as robbery. (b) So that where a traveller met a fisherman with fish, who refused to sell him any, and he by force and putting in fear took away some of his fish, and threw him money much above the value of it, judgment was respited, because of the doubt whether the intent were felonious on account of the money given. (c) It is suggested, however, with much reason, that questions of this kind should properly be referred to the consideration of the jury; and that the circumstance of the full value or more being offered at the time should be left to them to shew that the intention of the party was not fraudulent, and so not felonious. (d) For though it does not necessarily follow as a conclusion of law, that if the value of the thing taken be offered to be paid at the time, the intent is therefore not felonious; yet it is submitted, that such a circumstance would be pregnant evidence in the negative. (e) But cases where the owner is induced to part with his property at less than its value, by fear of the violence of any individual, or of the outrages of a mob, come under a different consideration, and constitute a sufficient taking with a felonious intent. (f)

The taking need not be immediately from the person of the owner: it will be sufficient if it be in his presence. (g) Therefore if A., upon being assaulted by a thief, throws his purse or cloak into a bush, and the thief takes it up and carries it away; or if, while A. is flying from the thief, he lets fall his hat, and the thief takes it up and carries it away, such taking being done in the presence of A. will be sufficient. (h) So, if the thief having first assaulted A. takes away his horse standing by him: or, having put him in fear, drives his cattle, in his presence, out of his pasture, he may be properly said to take such property from the person of A., for he takes it openly and before his face while

The taking is sufficient, if it be in the presence of the owner.

(y) Anon. O. B. 1698, 2 East. P. C. c. 16. s. 98. p. 669.

(z) 2 East. P. C. c. 16. s. 98. p. 669.

(a) Rex v. Simons, *Cornwall Lent Ass.* 1773. 2 East. P. C. c. 16. s. 128. p. 712.

(b) 1 Hawk. P. C. c. 24. s. 14. 4 Blac. Com. 244.

(c) The Fisherman's case, *York,*

26 Eliz. 2 East. P. C. c. 16. s. 98. p. 661, 662.

(d) 2 East. P. C. c. 16. s. 98. p. 662.

(e) *Id ibid.*

(f) *Post*, 72, *et seq.*

(g) 1 Hale 533. 1 Hawk. P. C. c.

34. s. 6. Rex v. Francis, 2 Str. 1015.

(h) 3 Inst. 68. 1 Hale 533.

under his immediate and personal care and protection. (i) But it is clear, that the property must be taken in the presence of the owner. And where it appeared upon a special verdict that some thieves gently struck the prosecutor's hand, whereby some money, which he had taken out from his pocket to give change, fell to the ground, and that, upon his offering to take it up, the thieves threatened to knock his brains out, upon which he desisted from taking up the money, and the thieves "then and there *immediately*" took it up; a great majority of the Judges held, that even by this statement it was not sufficiently expressed in the special verdict that the thieves took up the money in the sight or presence of the owner, and that they could not intend it, though there seemed to have been evidence enough to have warranted such a finding. (k) In a case where robbers, by putting in fear, made a waggoner drive his waggon from the highway in the day-time, but did not rob the goods till night, much doubt appears to have been entertained; some having holden it to be a robbery from the first force, but others having considered that the waggoner's possession continued till the goods were actually taken, unless the waggon were driven away by the thieves themselves; (l)

And the taking must not precede the violence, or putting in fear.

It may also be observed, with respect to the taking, that it must not, as it should seem, precede the violence or putting in fear; or rather, that a subsequent violence or putting in fear will not make a precedent taking, effected clandestinely, or without either violence or putting in fear, amount to robbery. Thus, where a thief clandestinely stole a purse, and, on its being discovered in his possession, denounced vengeance against the party if he should dare to speak of it, and then rode away, it was holden to be simple larceny only, and not robbery, as the words of menace were used after the taking of the purse. (m) But if the purse had been obtained by means of the menace, the offence would have amounted to robbery. (n)

Of the property being taken against the will of the party.

II.—The second subject of consideration in following the definition of this offence, is as to the taking "against the will" of the party.

In a case where the party upon whom the robbery was alleged to have been committed consented to the fact for a base purpose, it was holden to be no robbery. One Salmon and several others, in order to obtain for themselves the rewards given by act of parliament for apprehending robbers on the highway, concerted a plan by which a robbery might be effected upon Salmon by a person named Blee, who was one of the confederates, and two strangers procured by Blee. It was expressly found that Salmon was

(i) *Id. ibid.* and 1 Hawk. P. C. c. 34. s. 6. 4 Black. Com. 243.

(k) *Rex v. Francis*, 2 Str. 1015, *Rex v. Grey and others*, 2 East. P. C. c. 16. s. 126. p. 708. S. P. In *Rex v. Francis*, the Judges clearly thought it a case of grand larceny, and therefore would not discharge the prisoners, but directed a new indictment to be preferred, considering themselves confined to the doubt of the jury, whe-

ther there was a sufficient taking, and that they could not give judgment for a larceny.

(l) 2 East. P. C. c. 16. s. 126. p. 707, 708.

(m) *Harman's case*, 1 Hale 534. 1 Hawk. P. C. c. 34. s. 7.

(n) By Lord Mansfield in *Donally's case*, 2 East. P. C. c. 16. s. 130. p. 726.

a party to the agreement; that he consented to part with his money and goods under colour and pretence of a robbery; and that for such purpose, and in pursuance of this consent and agreement, he went to a highway at Deptford, and waited there till the colourable robbery was effected. The Judges were of opinion that, in consideration of law, no robbery was committed upon Salmon; and the reason given was, that his property was not taken against his will. (o)

III.—We may now proceed to enquire, as to “the violence or putting in fear.”

Of the violence, or putting in fear.

The words of the definition, as given at the beginning of the Chapter, are in the alternative, “violence or putting in fear;” and it appears, that if the property be taken by *either* of these means, against the will of the party, such taking will be sufficient to constitute robbery. (p) The principle, indeed, of robbery is violence; but it has been often holden, that actual violence is not the only means by which a robbery may be effected, but that it may also be effected by fear, which the law considers as constructive violence. (q)

It appears to have been sometimes considered that fear is a necessary ingredient in all cases of robbery, even in those effected by actual violence; (r) but if so, it will be presumed, And there are cases of this description in which fear can hardly be supposed to have existed: as if a man be knocked down without previous warning, and stripped of his property while senseless, he cannot with propriety be said to be put in fear, and yet that would undoubtedly be robbery. (s)

With respect to the degree of actual “violence,” where the taking is effected by that means, it appears to be well settled that a sudden taking or snatching from a person unawares is not sufficient. Thus, where a boy was carrying a bundle along the street in his hand, after it was dark, when the prisoner ran past him and snatched it suddenly away, it was holden that the act was not done with the degree of force and terror necessary to constitute robbery. (t) And the same was holden in a case where it appeared that as two little boys were carrying a parcel of cloth to one of the inns at Bath, for the purpose of its being carried by a stage-coach to London, the prisoner came up suddenly, snatched the cloth from the head of one of them, and ran off with it. (u)

Of the degree of violence.

(o) *Rex v. M'Daniel and others*, Fost. 121, 128. The case of Norden, post. 72, was cited on the part of the Crown; but Mr. Justice Foster remarks upon it as distinguishable on many grounds, Fost. 129.

(p) 2 East. P. C. c. 16. s. 127. p. 708. and the authorities there cited. Fost. 128.

(q) Donally's case, 1 Leach 196, 197. 2 East. P. C. 16. s. 130. p. 727. Reane's case, 2 Leach 619. 2 East. P. C. c. 16. s. 132. p. 735.

(r) Fost. 128. where the learned writer says, that there are opinions in the books which seem to make the

circumstance of fear necessary, but that he had seen a good MS. note of Lord Holt to the contrary, and that he was himself very clear that the circumstance of actual fear at the time of the robbery need not be strictly proved.

(s) Fost. 128. 4 Black. Com. 244. 2 East. P. C. c. 16. s. 128. p. 711.

(t) Macaulay's case, O. B. 1783, 1 Leach 287. Baker's case, *id.* 290. S. P.

(u) Robins's case, *Bridgewater Sum.* Ass. 1787, *cor.* Buller, J., 1 Leach 290, note (a).

The same doctrine was also holden in two other cases; in one of which the hat and wig of a gentleman were snatched from his head in the street; (w) and in the other, an umbrella was snatched suddenly out of the hand of a woman, as she was walking along the street. (x) But if any injury be done to the person; or there be any struggle by the party to keep possession of the property before it be taken from him, there will be a sufficient actual "violence." Thus, in the case which has been already mentioned, where an ear-ring was snatched from a lady's ear, and the ear torn through and blood drawn by the force used, it was holden to be robbery. (y) So, where a heavy diamond pin, with a cork-screw stalk, twisted very much in a lady's hair, which was close frizzed and strongly craped, was snatched out, and part of the hair torn away at the same time, it was holden that this was a sufficient degree of violence to constitute robbery. (z) And in a case where it appeared that the prisoner snatched at a sword while it was hanging at a gentleman's side, and that the gentleman, perceiving him get hold of the sword, instantly laid tight hold of the scabbard, which occasioned a struggle between them, in which the prisoner got possession of the sword and took it away; the court held that it was a robbery. (a) In a recent case the facts were that the prosecutor's watch was fastened to a steel chain which went round his neck, the seal and chain hanging from his fob; the prisoner laid hold of the seal and chain and pulled the watch from the fob; but the steel chain still secured it; upon which the prisoner by two jerks broke the steel chain and made off with the watch: and a case being saved for the opinion of the Judges upon the question whether this was a robbery, the Judges were unanimous that it was, as the prisoner did not get the watch at once, but had to overcome the resistance made by the steel chain, and used actual force for that purpose. (b) So that the rule appears to be well established, that no sudden taking or snatching of property from a person unawares is sufficient to constitute robbery, unless some injury be done to the person, or there be some previous struggle for the possession of the property, or some force used in order to obtain it. (c)

Violence accompanied with some colourable and specious pretence.

Where violence is made use of, to obtain the property with a felonious intent, as stated in the definition of this offence, it seems that it will not the less amount to robbery, on account of the thief having recourse to some colourable or specious pretence, in order the better to effect his purpose.

One Merriman, who was taking cheeses along the highway in a cart, was stopped by a person named Hall, who insisted upon seizing them for want of a permit. This was a mere pretence, no permit being necessary. After some altercation, Merriman and Hall agreed to go before a magistrate, to determine the matter:

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| (w) Steward's case, O. B. 1690, 2 | Leach 335. |
| East. P. C. c. 16. s. 121. p. 702. | (a) Davies's case, O. B. 11 Ann. 2 |
| (x) Horner's case, O. B. 1790, 2 | East. P. C. c. 16. s. 127. p. 709. 1 |
| East. P. C. c. 16. s. 121. p. 703. | Leach 290, note (a). |
| (y) Lapier's case, O. B. 1784, 1 | (b) Rex v. Mason, Mich. T. 1820. |
| Leach 320, ante, p. 63. | MS Bayley, J., and Russ. & Ry. 419. |
| (z) Moore's case, O. B. 1784. 1 | (c) Ante, 64. |

and, during Merriman's absence, other persons riotously assembled on account of the dearness of provisions, and, in confederacy with Hall for the purpose, carried away the goods. It was objected (upon an action against the hundred, on the statutes of hue and cry), that this was no robbery, because there was no force: but Hewitt, J., over-ruled the objection, and left the case to the jury, who were of opinion that Hall's conduct, in insisting upon seizing the cheese for want of a permit, was a mere pretence for the purpose of defrauding Merriman, and found that the offence was robbery; which was afterwards confirmed by the court of King's Bench on a motion for a new trial. (d) It is well observed upon this case, that the opinion that it amounted to robbery must have been grounded upon the consideration that the first seizure of the cart and goods by Hall, being by violence and whilst the owner was present, constituted the offence a robbery. (e)

In another case also, the offence was holden to be robbery, though the violence made use of was under the colour and pretence of a legal proceeding. The prosecutrix was brought to a police office by the prisoner, into whose custody she had been delivered by a headborough, who had taken her up under a warrant, upon a charge of having committed an assault upon a woman who lodged in her house. The magistrate at the office, having examined the complaint, ordered her to find bail; but at the same time advised the parties to make the matter up, and become good friends. The magistrate then left the office; (f) and the prisoner, who was an under-servant to the turnkey of the New Prison, Clerkenwell, and acted occasionally as a runner to the police office, but had no regular appointment either as a constable or other peace officer, nor had in particular any order to carry the prosecutrix to prison, (g) took her to an adjacent public-house, where her husband was waiting in expectation that she would be discharged. When her husband found that the matter was not settled, he requested that the prisoner would wait a short time, while he went to procure bail, and immediately left the house. As soon as he was gone, the prisoner began to treat the prosecutrix very ill, locked her up for some time in a stinking place, and then brought her out and threatened to carry her immediately to prison. She was terrified, and implored him to wait till her husband returned; and producing a shilling from her pocket, offered to give it him, or even to give him half-a-crown, if he would comply with her request: but he refused, and immediately handcuffed her to a man whom he had in custody on a charge of assault, and who, as the prisoner alleged, had before rescued himself. The prisoner then kicked her, thus handcuffed, before him; and shoved her and her companion into a coach, which he ordered to drive to the New Prison. He then came into the coach; and,

Gascoigne's case.

Where a bailiff handcuffed a woman, under pretence of carrying her to prison with greater safety, and by violence extorted money from her when so handcuffed, it was holden to be robbery.

(d) *Merriman v. The Hundred of Chippenham*, *cor. Hewitt, J.*, and afterwards *cor. B. R.* on the motion for a new trial, *Mich. 8 Geo. III. 2 East. P. C. c. 16. s. 127. p. 709.*

(e) *8 East. P. C. c. 16. s. 127. p. 709, note (a).*

(f) In the report of this case in *East*, it is said, that the prisoner alleged that the magistrate made out a warrant of commitment for the prosecutrix, but that it was not produced.

(g) See note (f).

almost immediately upon the coach setting off, put a handkerchief to the mouth of the prosecutrix, and forcibly took from her the shilling, which she continued to hold in her hand, saying, at the same time, "This will buy us a glass a-piece." He then asked her, if she had any more money in her pocket, said that he was sorry for her children, and that if she had as much money as would pay for the coach she should not go to prison. She exclaimed, that she had no more money: but the man who was handcuffed to her, rattled the handcuff against the side of her pocket; and the prisoner put his hand into her pocket, and took out three shillings. He then continued to promise to carry her back, but did not give any directions to the coachman to change his course. In about ten minutes after he had so taken the three shillings he stopped the coach at a public house, called for some gin, drank some himself, gave the coachman a glass, and offered the prosecutrix a glass, which she several times refused, but at last drank, upon his insisting she should do so: (h) he then gave the shilling which he first took from her to pay for the gin, and took sixpence in change. As the prisoner had promised to carry her back, the prosecutrix made no complaint at the public house, but said, that if the prisoner would carry her back he might keep the other three shillings which he had taken from her. The prisoner, however, proceeded with her to the New Prison. He paid a shilling, or one shilling and sixpence for the coach; but returned no part of the money to the prosecutrix. Nares, J., who tried the prisoner, said, that in order to commit the crime of robbery, it was not necessary that the violence used to obtain the property should be by the common and usual modes of putting a pistol to the head, or a dagger to the breast; and that a violence, though used under a colourable and specious pretence of law or of doing justice, was sufficient, if the real intention was to rob: and he left the case to the jury, with a direction that if they thought the prisoner had originally, when he forced the prosecutrix into the coach, a felonious intent of taking her money, and that he made use of the violence of the handcuffs as a means to prevent her making resistance, and that he took the money with a felonious intent, they should find him guilty. The jury found that the prisoner had a felonious intent of getting whatever money the prosecutrix had in her pocket, and that the putting her into the state described in the evidence was only a colourable mean of putting his felonious intention into execution. And upon the case being referred to the twelve Judges, they were unanimously of opinion that, as it was found by the verdict that the prisoner had an original intention to take the money, and had made use of violence, though under the sanction and pretence of law, for the purpose of obtaining it, the offence was clearly a robbery. (i)

Though the violence be used for a different purpose than that

(h) In the report of this case in Leach, it is said, that he induced her to drink a glass by repeating his promise that she should not be detained.

(i) Gascoigne's case, O. B. 1783.

cor. Nares, J. 1 Leach 280. considered of by the Judges in Mich. T. 1783. 2 East. P. C. c. 16. s. 127. p. 709. And see the Scm. pap. 295.

of obtaining the property of the party assaulted; yet if property be obtained by it, the offence will, under some circumstances at least, amount to robbery: as where money was offered to a party endeavouring to commit a rape, and taken by him. Blackham assaulted a woman with intent to ravish her, and she without any demand from him offered him money, which he took and put into his pocket, but continued to treat the woman with violence, in order to effect his original purpose, until he was interrupted: and this was holden to be robbery by a considerable majority of the Judges; on the ground that the woman, from the violence and terror occasioned by the prisoner's behaviour, and to redeem her chastity, offered the money, which it was clear she would not have given voluntarily; and that the prisoner, by taking it, derived an advantage to himself from his felonious conduct, though his original intent were to commit a rape. (j)

Though the violence be not used for the purpose of obtaining the property of the party assaulted; yet if property be obtained by it, the offence may be robbery.

With respect to "the putting in fear," or constructive violence, when that is the means by which the taking is effected, it may be considered, with reference, first, to those cases in which the fear excited has been of injury to the *person*; secondly, to those in which the fear excited has been of injury to the *property*; and, thirdly, to those in which the fear excited has been of injury to the *character*. It should, however, be remembered, as generally applicable to cases of this description, that where property is extorted by fear, it will constitute a robbery by putting in fear, though it may be taken in the shape of a colourable gift. (k) So that if a man whether with or without a drawn sword, or other offensive weapon, but with such circumstances of terror as indicate a felonious intention, ask alms from a person who gives to him through mistrust and apprehension of violence, it will be robbery: and so it will be if the thief, after having first made an assault, cease to use force, and ask money for alms, which is given him by the party attacked, while there remained a reasonable ground for the continuance of the fear excited by the assault. (l) And if thieves come to rob A., and, finding little about him, enforce him, by menace of death, to swear to bring them a greater sum, which he does accordingly, this is robbery, if the fear of that menace continued upon him at the time he delivered the money. (m)

Of the putting in fear.

The fear of injury to the *person* is that which is commonly excited on the commission of this offence; and where property is obtained by this means it will amount to robbery, though there be no great degree of terror or affright in the party robbed. It is

Of the fear of injury to the person.

(j) Blackham's case, 1787. 2 East. P. C. c. 16. s. 128. p. 711.

(k) *Ante*, 64. *et sequ.*

(l) 2 East. P. C. c. 16. s. 128. p. 711. 4 Black. Com. 244. *Ante*, 64. *et sequ.*

(m) *Ante*, 64. Fitzh. Coron. pl. 464. 3 Inst. 68. 1 Hale 592. 2 East, P. C. c. 16. s. 129. p. 714. in which last book the reason given by Hawkins (1 Hawk. P. C. c. 34. s. 1.) for this doctrine, and which would seem to lead to the conclusion, that it would be robbery

in such case, though the party delivered the money solely under the mistaken conscientious compulsion of his oath, is denied. And from note (a) in East. P. C. *ibid.* it seems that the delivery of the money was an act more immediately consequent upon the menace and oath than would appear from the statement of the case as given in the text from 3 Inst. and 1 Hale.

enough if the fact be attended with such circumstances of terror, such threatening by word or gesture, as, in common experience, are likely to create an apprehension of danger, and induce a man to part with his property for the safety of his person. (n) And it is not necessary that actual fear should be strictly and precisely proved: as the law, in *odium spoliatoris*, will presume fear, where there appears to be a just ground for it. (o)

Such fear may be presumed, though the party go to meet the robber, and for the purpose of apprehending him.

One Norden, having been informed that one of the early stage coaches had been frequently robbed near the town by a single highwayman, resolved to use his endeavours to apprehend the robber. For this purpose, he put a little money and a pistol into his pocket, and attended the coach in a post chaise, till the highwayman came up to the company in the coach, and to him, and presenting a weapon demanded their money. Norden gave him the little money he had about him, and then jumped out of the chaise with the pistol in his hand; and, with the assistance of some others, took the highwayman. This was holden to be a robbery of Norden. (p)

And this fear may exist, though the property be taken under colour and on pretence of a purchase.

The fear necessary to constitute the crime of robbery may exist, though the property be taken under colour, and on the pretence of a purchase. For if a person by force or threats compel another to give him goods, and by way of colour oblige him to take, or if he offer less than the value, it is robbery: as where the prisoner took a quantity of wheat worth eight shillings, and forced the owner to take thirteenpence halfpenny for it, threatening to kill her if she refused, the offence was clearly holden to be robbery by all the Judges upon a conference. (q) But whether the forcing a chapman to sell his wares, and giving him the full value for them, will amount to robbery, has been considered as doubtful. (r)

The fear may be of violence to the child of the party.

It seems that the fear of violence to the person of a child of the party from whom property is demanded will fall within the same consideration as if the fear were of violence to the person of the party himself. Thus where a case was put in argument of a man walking with his child, and delivering his money to another person upon a threat that, unless he did so, the other would destroy his child, Hotham, B., said, that he had no doubt that it would be robbery. (s) And in a subsequent case Eyre, C. J., said, that a man might be said to take by violence, who deprived the other of the power of resistance, by whatever means he did it; and that he saw no sensible distinction between a personal violence to the party himself, and the case put by one of the Judges of a man holding another's child over a river and threatening to throw it in unless he gave him money. (t)

Of the fear of injury to the property.

The cases in which the offence of robbery has been committed by means of a fear of injury to the *property* of the party are prin-

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| (n) <i>Fost.</i> 128. 4 <i>Black. Com.</i> 243, p. 712. | (r) 1 <i>Hawk. P. C. c.</i> 34. s. 14. 4 |
| 244. <i>Donally's case</i> , 1 <i>Leach</i> 197. | <i>Black. Com.</i> 244. <i>ante</i> , 63. |
| (o) <i>Fost.</i> 128. 2 <i>East. P. C. c.</i> 16. s. 128. p. 711. | (s) <i>Donally's case</i> , 1779. 2 <i>East.</i> |
| (p) <i>Fost.</i> 129. | <i>P. C. c.</i> 16. s. 130. p. 718. |
| (q) <i>Simons's case</i> , <i>Cornwall Lent Ass.</i> 1773. 2 <i>East. P. C. c.</i> 16. s. 128. | (t) <i>Reave's case</i> , 1794. 2 <i>East.</i> |
| | <i>P. C. c.</i> 16. s. 132. p. 735. |

cipally those in which the terror excited was of the probable outrages of a mob.

The prisoner, who was a ringleader in some riots amongst the tinnerns in Cornwall, came with about seventy of his companions to the house of the prosecutor, and said, that they would have from him the same as they had from his neighbours, namely, a guinea, or else they would tear his mow of corn, and level his house. He gave them a crown to appease them; when the prisoner swore that he would have five shillings more, which the prosecutor, being terrified, gave him. They then opened a cask of cyder by force, drank part of it, and eat the prosecutor's bread and cheese; and the prisoner carried away a piece. The indictment contained two counts, one for robbing the prosecutor of ten shillings in his dwelling-house by assault and putting him in fear, and the other for putting the prosecutor in fear and taking from him in his dwelling-house a quantity of cyder, pork, and bread. And it was holden robbery in the dwelling-house. (u)

Simons's case. Threat to tear the mow of corn, and level the house of the prosecutor.

During the riots in London, in the year 1780, a boy with a cockade in his hat knocked violently at the prosecutor's door, who thereupon opened it, when the boy said to him, "God bless your honour, remember the poor mob." The prosecutor told him to go along; on which he said, "Then I will go and fetch my captain," and went away: but soon afterwards the mob, to the number of a hundred, armed with sticks and such other things as they had been able to procure, came, headed by the prisoner, who was on horseback, and whose horse was led by the same boy. On their coming up the bystanders said, "You must give them money;" and the boy said, "Now, I have brought my captain:" and some of the mob said, "God bless this gentleman, he is always generous." The prosecutor then said to the prisoner, "How much?" to which the prisoner answered, "Half-a-crown, Sir;" upon which the prosecutor, who had before only intended to give a shilling, gave the prisoner half-a-crown. The mob then gave three cheers, and went to the next house. This was holden to be robbery. (x)

Taplin's case. Money extorted by the prisoner at the head of a mob without any particular threat being expressed.

In another case, which occurred also upon the trial of some of the rioters in the year 1780, the prosecutor swore that the prisoner and another man entered into his dwelling-house; and, upon being asked by him what they wanted, the prisoner, having a drawn sword in his hand, said with an oath, "Put one shilling into my hat, or I have a party that can destroy your house presently;" upon which he gave him a shilling. It was also sworn, by another witness, that the prisoner also said, that if the prosecutor "would keep the blood within his mouth, he must give the shilling." This offence was also holden to be robbery. (y)

Brown's case. Money extorted by a threat of destroying the house.

In a subsequent case, corn was taken from the prosecutor by

Spencer's case.

(u) Simons's case, 1773. 2 East. P. C. c. 16. s. 131. p. 731. See another case against the same prisoner, where the threat was of injury to the person, *ante*, 72.

(x) Taplin's case, O. B. 1780. 2 East. P. C. c. 16. s. 128. p. 712.

(y) Brown's case, O. B. 1780. 2 East. P. C. c. 16. s. 131. p. 731.

Threat of taking corn away, by which the prosecutor was compelled to sell it for less than its value.

Astley's case. Money obtained by a threat, that the house of the prosecutor should be pulled down by a mob at a future time.

the prisoner, and a mob who accompanied him, compelling the prosecutor to sell it under its value, by a threat that if he would not sell it at the sum offered, it should be taken away. The prosecutor had corn belonging to other persons in his possession; when the prisoner came to him, together with a great mob marching in military order. One of the mob said that if he would not sell they were going to take it away; and the prisoner said that they would give thirty shillings a load, and if he would not take that, they would take the corn away; upon which the prosecutor sold corn for thirty shillings, which was worth thirty-eight shillings. This was ruled to be robbery. (z)

Some years subsequent to the cases which have been mentioned; and during the riots at Birmingham, a case occurred where money was obtained from the owner by a threat that if he did not give it, his house should be destroyed by a mob. The two prisoners were indicted for robbing one Jonathan Grundy. The evidence in substance was that the prisoners, together with a man who was unknown, went to the house of Mr. Grundy, near Birmingham; when, upon Mr. Grundy coming out, they pulled off their hats and shouted "Church and King;" upon which Mr. Grundy did the same, and advanced towards the prisoners in much alarm, when the stranger accosted him, and said, "I am come out of friendship to you, Mr. Grundy, to let you know your house is marked to come down to-morrow morning at two o'clock.—I am the head of the mob; they are two thousand strong in Birmingham—I must have something to make my men drink; I can bring two or three hundred in an hour's time, or keep them back." Mr. Grundy said, "As to something to drink, you shall have any thing you have a mind for." The stranger then said, "I must have money." Mr. Grundy offered him half-a-crown, which he rejected with contempt; upon which Mr. Grundy asked what he wanted, and he replied that he must have twenty guineas; and, upon Mr. Grundy telling him that he had not so much in the house, said, that if Mr. Grundy did not give him something handsome for his men to drink, his house should come down. Mr. Grundy said, that he might have nine or ten guineas; which he asked to see. While Mr. Grundy was taking his purse out of his pocket, one of the prisoners told him he might depend upon it that the stranger was the head of the mob; with other discourse of a similar kind as to his power; and particularly that he was the first man who had entered every house that had been destroyed. This expression so struck Mr. Grundy, that he immediately took the money, which amounted to nine guineas and a half, out of his purse, and gave it to the stranger; who counted it, and demanded something to drink; when they all went into Mr. Grundy's house, and had some liquor; after which, in going away, they assured Mr. Grundy that he should be protected. There was no evidence that the prisoners had any of the money at the time; but it appeared that a small share of it was

(z) Spencer's case, *cor.* Buller, J., *York Sum. Ass.* 1783. 2 East. P. C. c. 16. s. 128. p. 712, 713. The prisoner was executed. As to cases where

the owner has been compelled to part with his property under colour of a purchase, see *ante*, 65, 72.

given to them afterwards. Mr. Grundy, in giving his evidence, said, that he was greatly alarmed, but not for his person; that no injury was threatened to his person; but that, when he delivered his money, his apprehension was that, if he had refused to do so, the men would have gone to Birmingham, and have returned with other persons, and pulled down his house and plundered it, (before he could have removed his wife, who was in the house in great agitation,) as they had threatened, and as different houses in Birmingham had been before pulled down.

Upon these facts it was objected, on behalf of the prisoners, that there was no evidence of robbery, as the prosecutor did not deliver his money from any immediate fear of danger to himself or his property, but from an apprehension of future injury to his house by pulling it down. The truth of the evidence was, however, left to the jury; who found the prisoners guilty, saying, that they were satisfied that Mr. Grundy did not deliver his money from any apprehension of danger to his life or person, but from an apprehension that, if he refused, his house would at some future time be pulled down, as the prisoners and the stranger threatened, in the same manner as other houses in Birmingham had been before, and, the facts of the case being afterwards submitted to the Judges, for their opinion, whether the evidence amounted to robbery, a majority of them held that it did. (a)

The cases of robbery in which the property has been obtained by means of a fear being excited of injury to *the character* of the party robbed appear to be all of one description. Indeed it has been said, that the terror which leads a party to apprehend an injury to his character has never been deemed sufficient to support an indictment for robbery, except in the particular instance of its being excited by means of insinuations against, or threats to destroy the character of the party pillaged, by accusing him of sodomitical practices. In the case in which this doctrine is laid down it appeared that the prisoners, assisted by other persons, got the prosecutrix into a house, under pretence of an auction being carried on there, forced her to bid for a lot of articles which was immediately knocked down to her, and then, upon her not producing the money to pay for it, threatened that she should be taken to Bow-street, and from thence to Newgate, and be imprisoned till she could raise the money; that, after these threats had been used, a pretended constable was introduced, who said to the prosecutrix, "Unless you give me a shilling, you must go with me," upon which she was induced to give the pretended constable a shilling; and that the prosecutrix parted with the shilling, being in bodily fear of going to prison, as a means of obtaining her liberty, and to avoid being carried to Bow-street and to Newgate, and not out of fear or apprehension of any other personal force or violence. The Judges, after argument, and a minute discussion of the circumstances of the case, were of opinion that they were not sufficient to constitute the crime of robbery. They thought that the threat used of taking the prosecutrix to Bow-street, and

Of the fear of injury to the character.

The fear of being sent to prison is not alone a sufficient ground of terror to constitute robbery.

(a) *Astley's case, (James and Ezekiel), 2 East. P. C. c. 16. s. 131. p. 729.*

from thence to Newgate, was only a threat to put her into the hands of the law, which she might have known would have taken her under its protection and set her free, as she had done no wrong; that an innocent person need not in such a situation be apprehensive of danger; and, therefore, that the terror arising from such a source was not sufficient to induce an individual to part with property, so as to amount to a robbery. And they said, it was a case of simple duress for which the party injured might have a civil remedy by action, which could not be, if the fact amounted to felony. (b)

But the fear of injury to character, which may be excited by accusing a person of sodomitical practices, had been holden to come under a different consideration, long before the recent statute which has been already mentioned. As the imputation of being addicted to so odious and detestable a crime would be sufficient to deprive the injured person of all the comforts and advantages of society, and would inflict a punishment more terrible than death, both in apprehension and reality, the law considered the fear of losing character by such an imputation, as equal to the fear of sustaining personal injury, or even of losing life itself. (c)

This recent statute of 7 & 8 Geo. 4. c. 29. enacts "that if any person shall accuse, or threaten to accuse, any other person of any infamous crime as therein after defined, (d) with a view or intent to extort or gain from him, and shall, by intimidating him by such accusation or threat, extort or gain from him any chattel, money, or valuable security, every such offender shall be deemed guilty of robbery, and shall be indicted and punished accordingly." It is clear upon this enactment, that the offender must extort or gain the property from the party robbed by *intimidating* such party, and that the intimidation must be by an accusation or threat to accuse of an infamous crime. With respect to the nature and degree of the *intimidation*, it should seem that if the accusation or threat produces a reasonable fear of loss of character, the *intimidation* will be sufficient though the accusation or threat be not accompanied with any actual violence, and though it do not produce any fear of being taken into custody, or exposed to any punishment. The more recent cases decided prior to the statute, appear to lead to this conclusion.

The prisoner was indicted for a highway robbery, in the year 1776, and the following facts appeared upon the evidence. The prosecutor and the prisoner, not being at the time at all acquainted, pressed, together with a great crowd, into the upper gallery of the play-house at Covent-garden, after which the prisoner took his seat by the side of the prosecutor. During the play the prisoner asked the prosecutor whether a journeyman who had spoken to him was of his company; to which the prosecutor replied in the

Jones's case. Case of robbery where the prosecutor stated, that at the time he parted with his money he understood the threatened

(b) *Rex v. Knewland and Wood*, O. B. 1796, 2 Leach 721. 2 East. P. C. c. 16. s. 131. p. 732. It appears from the latter book, that the case was considered by the Judges in Hil. T. 1796, Ashhurst, J., Hotham, B., Perryn, B., and Buller, J., being absent. But the

opinion of the Judges was afterwards delivered by Ashhurst, J., who did not state that he in any way dissented.

(c) By Ashhurst, J., in the case of *Knewland and Wood*, 2 Leach 731.

(d) *Ante*, 62.

negative; and no other conversation passed between them during the play. When the play was over the prisoner followed the prosecutor out of the house, and as they were crossing Bow-street proposed to him to have something to drink, to which the prosecutor assented, and they went together to an adjoining public-house. In a few minutes, and after they had drunk some porter, the prisoner turned towards the prosecutor, and asked him what he meant by the liberty he had taken with his person in the play-house. The prosecutor said, that he knew of no liberties being taken; when the prisoner replied, "Damn you, Sir, but you did; and there were several reputable merchants in the house who will take their oaths of it." The prosecutor, much alarmed, immediately rose from his seat, paid for the porter, and went out of the house, saying to the prisoner, that he did not know what he meant. The prisoner followed him into the street, where there was a considerable crowd, and hallooed out, "Damn you, Sir, stop! for if you offer to run, I will raise a mob about you;" and then seizing him violently by the arm, exclaimed, "Damn you, Sir! this is not to be borne! you have offered an indignity to me, and nothing can satisfy it!" The prosecutor, terrified by these expressions, and the manner in which they were uttered, replied, "For God's sake what do you want, what would you have me do?" to which the prisoner said, in a lower tone of voice, "A present—a present—you must make me a present." The prosecutor asked him, "A present, of what?" upon which the prisoner said, "Come, come, what money have you? How much can you give me now?" The prosecutor said, he had but little money, but that the prisoner should have what he had about him; and accordingly gave him three guineas, and some silver. The prisoner said, it was not enough, and demanded more. During the whole of this conversation the prisoner held the prosecutor fast by the arm, and thereby defeated several efforts which he made to get away; and at length, when he suffered the prosecutor to walk on, still accompanied him, keeping tight hold of his arm, down another street. At length the prisoner loosed his arm, but did not leave him; and as he refused to tell his name, or where he lived, followed him to the door of his lodgings. Early the next morning the prisoner called at the lodgings, and frightened the prosecutor out of a further sum of forty pounds. The prosecutor soon afterwards communicated what had happened to a friend, and by his advice determined to apprehend the prisoner when he could meet with him; but he was not apprehended till some months after, when he again called upon the prosecutor, and again threatened to impeach his character, unless he would give him more money.

In this case the prosecutor swore, that at the time he parted with his money he understood the threatened charge to be the imputation of sodomy; that he was so alarmed by the idea, that he had neither courage nor strength to call out for assistance; and that the violence with which the prisoner had detained him in the street had put him in fear for the safety of his person. The case was left to the jury, with a direction to consider whether the prosecutor parted with his money under the impression of fear; and

charge to be an imputation of sodomy; that he was so alarmed by the idea, that he had neither courage nor strength to call out for assistance; and that the violence with which he had been detained in the street by the prisoner, put him in fear for the safety of his person.

the jury found the prisoner guilty; declaring, that they thought that such an accusation would strike a man with as much or more terror than if he had a pistol at his head. Judgment being respited in order that the opinion of the Judges might be taken, the point was afterwards considered by them; and they were of opinion, that the conviction for a highway robbery was proper; that, in order to constitute robbery, there was no occasion to use weapons, or real violence; and that taking money from a man in such a situation as rendered him not a free man (as if a person so robbed were in fear of a conspiracy against his life or character) was such a putting in fear as would make the taking of his money under that terror a robbery. (e) And a case which had been previously decided upon the same point, was mentioned with approbation. (f)

In the latter case, which was so mentioned with approbation by the Judges, it appears that there was some actual violence used in the assault, and a laying of hands on the party; and in the former case, there was, as has been seen, a continual force and violence, and a threat to deliver the party up to the mob as a sodomite, besides the fact of laying hold of the arm; circumstances which were afterwards urged as giving a peculiar character to those cases, and as making them distinguishable from one in which no such circumstances should exist. (g) But the circumstances of actual violence appear to have been considered as not material in a case in which the Judges, after great discussion, held the offence to amount to robbery.

Donally's case. Obtaining money by saying, "You had better comply, or I will take you before a magistrate and accuse you of an attempt to commit an unnatural crime," holden to be robbery.

On the 18th of January, 1779, the prosecutor, a young gentleman, was passing through Soho-square, between the hours of six and seven o'clock in the evening, when he met the prisoner, whom he had never seen before. The prisoner accosted him, and desired that he would give him a present. The prosecutor said, "For what?" The prisoner answered, "You had better comply, or I will take you before a magistrate, and accuse you of an attempt to commit an unnatural crime." The prosecutor then gave him half a guinea, which the prisoner said was not sufficient; but the prosecutor had no more in his pocket. On the 20th of January, about four o'clock in the evening, the prosecutor met the prisoner again in Oxford-street, who made use of the same threats as before; telling the prosecutor that he knew what had passed in Soho-square, and that unless he would give him more money, he would take him before a magistrate and accuse him of the same attempt; adding, that it would go hard against him, unless he could prove an *alibi*. The prosecutor then went to the shop of a grocer in Old Bond-street, the

(e) Jones's *alias* Evans's case, 1776, 1 Leach 139. 2 East. P. C. c. 16: s. 130. p. 714. Nine of the Judges only were present at the consideration of the case, De Grey, C. J., and Ashhurst J., being absent, and there being one vacancy.

(f) Brown's case, O. B. 1763, *cor.* Eyre, B., when Recorder, 2 East. P. C. c. 16. s. 130. p. 715. where Har-

rold's case, *alias* Hutton's, O. B. 1778, is mentioned, as one in which the prisoner was convicted for a similar robbery.

(g) See the judgments of Perryn, B., and Blackstone, J., in Donally's case, 2 East. P. C. c. 16. s. 130. p. 717, 718, 721. and the judgment of the court, as delivered by Willes, J., in Donally's case, 1 Leach 199.

prisoner following him, and staying on the outside of the door; and the prosecutor, being in the shop, took a guinea out of his pocket, gave it to the grocer, and desired he would give it to the man at the door, which the grocer did, and the prisoner then went away. The prosecutor stated, that he was exceedingly alarmed at both the times, and under that alarm gave the money; that he was not aware what were the consequences of such a charge, but apprehended that it might cost him his life.

The case was left to the jury, with directions to consider, first, whether they were satisfied that the prosecutor delivered his money through fear, and under an apprehension that his life was in danger; and, secondly, if they should not think that the prosecutor apprehended that his life was in danger, then, whether the money was not obtained by means of the prisoner's threats, and against the will of the prosecutor; for if it were, even in that case, though he were not in fear of his life, the crime would amount to robbery. The jury found the prisoner guilty; and said that they were satisfied that the prosecutor delivered his money through fear, and under an apprehension that his life was in danger. But, doubts being entertained respecting the conviction, the judgment was respited, and the question submitted to the opinion of the Judges. Some difference of opinion prevailing amongst them, they directed the case to be argued; and after argument, and very full consideration, they at length all agreed that it amounted to robbery.

The opinions of the Judges were delivered *seriatim*, and contain some learned and interesting discussions relating to the nature of the fear by which a party may be induced to part with his property, in cases where no actual violence is employed to obtain it: (A) and Willes, J., afterwards delivered the result of their deliberations. He said, that the facts of the case shewed that there was the necessary felonious intention in the prisoner to rob the prosecutor; and that it was impossible to raise a doubt, that there was a sufficient taking from the prosecutor's person. With respect to the putting in fear, he stated, that it is not necessary to lay a putting in fear in the indictment; and that the circumstance of actual fear need not be proved upon the trial; for if the fact be laid to be done violently and against the will, the law *in odium spoliatoris* will presume fear. That there need not be actual violence, a reasonable fear of danger caused by constructive violence being sufficient; and that where such terror is impressed upon the mind as does not leave the party a free agent, and he delivers his money in order to get rid of that terror, he may clearly be said to part with it against his will, so as to constitute robbery. That no actual danger is necessary; as a man may commit a robbery without using any offensive weapon; as by using a tinder-box or candlestick instead of a pistol. And that when a villain comes and demands money, no one knows how far he will proceed. The learned Judge then referred to the facts and circumstances of the case, as sufficient to bring it within these rules of law. He stated,

(A) These opinions are given at East. P. C. c. 16. s. 130. p. 716, to p. length in the report of the case in 2 726,

that the situation of the prosecutor was that of a young gentleman accosted at night, in the streets of London, by a person he never saw before, and whom he must have suspected to be a villain; and that this person *demand*ed a present. Even that seemed sufficient to satisfy the legal idea of robbery. But the prisoner went further, and used the words, "You had better comply, or I will take you before a magistrate." This then was a threat of personal violence; for the prosecutor had every thing to fear in being dragged through the streets as a culprit charged with an unnatural crime. It was a threat which must necessarily and unavoidably produce intimidation, and occasion a reasonable fear, which might operate *in constantem virum*, as well as *in meticulosum virum*. He then observed, upon the argument urged by the counsel for the prisoner, that this was a fraudulent taking, and not a taking by violence: and said, that in many cases fraud would supply the place of violence; as in burglary: where, though it was necessary to charge a breaking in the indictment, yet there might be a constructive breaking by a person fraudulently getting admission into a house by colour of law, or under pretence of taking lodgings, or of having business. (i) But he said, that the Judges did not determine the case entirely on this ground, but were of opinion that there was proof of a constructive violence, which they thought was sufficient; and that they were all of opinion, that enough was proved in this case for the jury to find the prisoner guilty of robbery. (k)

This doctrine appears to have been acted upon in subsequent cases; (l) in one of which the party delivered his money solely from fear of losing his character.

Hickman's case. Obtaining money by threatening to take another before a justice, on a charge of an unnatural offence, holden to be robbery, though the prosecutor stated, that he parted with his money under an idea of preserving his character, and not from fear of personal violence.

Daniel Hickman was indicted in 1783 for robbing one John Miller of two guineas. It appeared upon the evidence that the prosecutor had some employment in the palace at St. James's, and an apartment there in which he was accustomed to sleep, and that the prisoner was occasionally a sentinel on guard at the palace. One night the prosecutor treated the prisoner with some bread and cheese and ale, in his room. About a fortnight afterwards, very late in the evening, the prosecutor was going up stairs to his apartment, when he heard somebody close behind him, and, on turning round, saw that it was the prisoner, who said, "It is me." The prosecutor asked him, what brought him there at that time of night: upon which the prisoner answered, "I am come for satisfaction; you know what passed the other night; you are a sodomite; and if you do not give me satisfaction, I will go and fetch a serjeant and a file of men, and take you before a justice; for I have been in the Black Hole ever since I was here last, and I do not value my life." The prosecutor then asked

(i) *Ante*, 8. *et sequ.*

(k) Donally's case, 1779, 1 Leach 193. 2 East. P. C. c. 16, s. 130. p. 715 to 728.

(l) Staple's case, O. B. 1779. Hickman's case, O. B. 1783, considered of by the Judges in 1783, 2 East. P. C. c. 16. s. 130. p. 728. Staple was ex-

cuted, but Hickman was reprieved on condition of transportation. It appears from Hickman's case, (1 Leach 279.) that Donally was not executed, and that some doubts had been entertained as to the opinion of the twelve Judges in that case.

him, what money he must have; when the prisoner said, "I must have three or four guineas." The prosecutor gave him two guineas, which was all he had, and promised to give him another guinea the next morning: and the prisoner took the two guineas, saying, "Mind, I don't *demand* any thing of you." The next morning he came and received the other guinea; and, in a few days after, upon making an application for more money upon the same pretence, he was apprehended. The prosecutor swore, that he was very much alarmed when he gave the prisoner the two guineas, and did not very well know what he did; but that he parted with his money under an idea of preserving his character from reproach, and not from the fear of personal violence.

The learned Judge who tried the prisoner, in leaving the case to the jury, remarked, upon the point in which it might be supposed to differ from that of Donally, ^(m) that in Donally's case the prosecutor had sworn that he delivered his money under an apprehension of personal danger, as well as from the fear of losing his character: but that in the present case the prosecutor had sworn that he parted with his money for the sake of his character only, and not from any apprehension of danger to his person. The jury found the prisoner guilty; and that the prosecutor parted with his money, against his will, through a fear that his character might receive an injury from the prisoner's accusation: but as some doubt was entertained whether the case was within the principle upon which Donally's proceeded, it was submitted to the consideration of the Judges; and their opinion was, afterwards, delivered by Ashhurst, J., to the following effect: "Some doubts having been entertained as to the opinion of the twelve Judges, in the case of Patrick Donally, the learned Judge, who tried the prisoner, thought it proper that the present case should, likewise, be referred to their consideration. They have, accordingly, conferred upon it; and they are of opinion that it does not *materially* differ from the case of Donally: for that the true definition of robbery is the stealing, or taking from the person, or in the presence of another, property of any amount, with such a degree of force or terror as to induce the party unwillingly to part with his property; and whether the terror arises from real or expected violence to the person, or from a sense of injury to the character, the law makes no kind of difference; for to most men the idea of losing their fame and reputation is equally if not more terrific than the dread of personal injury. The principal ingredient in robbery is a man's being *forced* to part with his property: and the Judges are unanimously of opinion that upon the principles of law, and the authority of former decisions, a threat to accuse a man of having committed the greatest of all crimes is, as in the present case, a *sufficient force* to constitute the crime of robbery, by putting in fear." ⁽ⁿ⁾

^(m) *Ante*, 78.

⁽ⁿ⁾ Hickman's case, 1 Leach 278.

2 East. P. C. c. 16. s. 130, p. 728. The VOL. II.

prisoner was not executed: see *ante*, note (l).

bery, unless the money were taken immediately upon the threat made, and not after the parties had separated, and there had been time for the prosecutor to deliberate and procure assistance: and more especially not, where the prosecutor consulted a friend, and such friend was present when the money was paid.

said that one of the soldiers named Jackson, had said that he had *abused* him; and that Jackson was then come over to Carlton, (an adjoining place) and would certainly follow the law, unless he would come and make it up with him: but, that if he went there and made it up with Jackson, there would be no more of it. The prosecutor answered, that he knew nothing of the sort, but that he would go and hear what Jackson had to say. Shipley and Morris then went away; and the prosecutor followed them to a public-house, kept by S. Rowe, at Carlton, where he also found the prisoner Jackson, and another soldier. Some conversation took place in a private room, when Jackson preferred the same charge against the prosecutor of his having unnaturally abused him; which was positively denied by the prosecutor. At last Jackson told the prosecutor, that if he would pay him the expences, there should be no more of it; and upon the prosecutor saying that he was willing to pay any thing in reason, Morris and Shipley made out a sort of account, by setting down in writing the following articles as mentioned by Jackson, "Doctor, 1*l.* 11*s.* 6*d.* "—For abusing me, 1*l.* 8*s.*—Morris, 10*s.*—Shipley, 5*s.*—The "other soldier, 2*s.* 6*d.*" The total was 3*l.* 17*s.*—but they asked to have four guineas. The prosecutor said, he had no such money: but, upon their insisting upon having it, he said he would try to get it from his parents; and asked one of them to accompany him, which Shipley accordingly did. The prosecutor swore that he was much frightened and hurried, and did not know what best to do. He went however, accompanied by Shipley, to his mother's; and, under the pretence of a soldier having been hurt, obtained from her four guineas. On their return to the public-house, the prosecutor stopped at the house of one Shelton, and prevailed upon Shelton to go along with him. Shelton enquired what was the matter; and upon being informed by Shipley, declared his disbelief of the charge, and said that if it were his own case, he would not pay the money; upon which Shipley said, that if the prosecutor did not pay the money, it would cost him 50*l.* or 100*l.* or perhaps his neck; that he was himself a constable, and would go for a warrant the next morning. This language frightened the prosecutor very much. When the prosecutor, Shipley, and Shelton got to the public-house, Jackson, Morris, and the other soldier, were in the same room in which the prosecutor had left them. The prosecutor sat down; and, after a few minutes, laid the four guineas upon the table, and asked who would take it; upon which they all said "Jackson:" but Shipley took it up; and amongst them they returned back six shillings to the prosecutor, half-a-crown of which was said to be for his friend's expences (meaning Shelton). The prosecutor asked for a receipt; but Morris said his friend would do as well: and Shelton made some enquiries as to the doctor to whom Jackson had applied, but received only evasive answers. The prosecutor swore to the falsehood of the charge, but said he was scared at it, and that was the reason why he parted with his money. On his cross-examination it appeared, that Jackson had first made the charge on the morning after the night they had lain together, but did not repeat it then; and that they continued eating and drink-

ing for several hours after : that afterwards he had heard of Jackson's having repeated the charge in several companies, which had caused him much agitation. Shelton's evidence went to confirm the prosecutor in his account as to the part of the transaction which happened in his presence ; and he also swore that as they were going into the public-house, he called the prosecutor back, and advised him not to pay the money. And he added, that the prosecutor was quite scared out of his wits.

These facts being left to the jury, they found the prisoners guilty, and sentence was passed upon them ; but execution was respited on a doubt conceived by Graham, B., by whom they were tried, whether the case did not go somewhat beyond those which had been previously decided ; and principally, because the prosecutor had a friend present during the transaction. The case being submitted to the consideration of the Judges, a majority of them were of opinion that it did not amount to robbery, though the money were taken in the presence of the prosecutor, and the fear of losing his character were upon him. Most of such majority thought that, in order to constitute robbery, the money must be parted with *from an immediate apprehension of present danger upon the charge being made* ; and not, as in this case, where the parties had separated, and the prosecutor had time to deliberate upon it, and apply for assistance ; and had applied to a friend, by whom he was advised not to pay it, and who was actually present at the very time when it was paid ; which circumstance they thought had the appearance rather of a composition of a prosecution than of a robbery, and seemed like a calculation whether it were better to lose his money, or risk his character. And one of the Judges, who agreed that it was not robbery, thought that there was not such a *continuing fear* as could operate *in constantem virum*, from the time when the money was demanded, until it was paid ; as in the interval the prosecutor had taken advice, and might have procured assistance. Those Judges, who thought the case did amount to robbery, considered the question as concluded by the finding of the jury, that the prosecutor had parted with his money through fear continuing at the time, which fell within the definition of robbery which had been long adopted and acted upon ; and they said that it would be difficult to draw any other line. They thought also that this sort of fear so far differed from cases of mere bodily fear, that it was not likely to be dispelled, as in those cases, by having the opportunity of applying to magistrates or others for assistance ; the money being given to prevent the public disclosure of the charge. (s)

Mr. East, who cites this case, from MS. Jud. (t) suggested a question whether the decision did not in a great measure overrule the case of Hickman, which is mentioned in the preceding pages. (u) But it should be observed, that the circumstances of these cases materially differ ; and particularly that in Hickman's case the two guineas were given *immediately* upon the charge

(s) *Rex v. Jackson, Shipley, and Morris, cor. Graham, B., Nottingham Spr. Ass. 1802, and E. T. 1802.* 1

East. P. C. *Addenda* xxi.

(t) *Id.* xxiv. in the margin.

(u) *Ante*, 80, *et seq.*

being made, and that there was no previous application to any friend or other person, from whom advice or assistance might have been procured.

Elmstead's case. Money was obtained by calling a man a sodomite and threatening him, but the money was parted with by the prosecutor, not so much from fear of losing his character as from fear of losing his place.

Hickman's case was again observed upon in a case which occurred shortly afterwards. The prisoner went twice to the house where the prosecutor lived in service, and called him a sodomite and b——r. The prosecutor took him each time before a magistrate, who discharged the prisoner. On leaving the magistrate the prisoner followed the prosecutor, again called him a sodomite and b——r, and asked him to make him a present, said he would never leave him till he had pulled the house down, but if he did make him a handsome present, he would trouble him no more. He asked four guineas, and the prosecutor being frightened for his reputation, and for fear of losing his situation, gave him the money. He gave the money from the great apprehension and fear he had of losing his situation. The prisoner was convicted before Hotham, B., (Le Blanc, J., and Chambre, J., being present,) but upon a doubt in the privy council, the opinion of the Judges was taken. Most of the Judges thought that this was within Hickman's case, and nine of them (v) seemed to think Hickman's case binding, but the three others (x) thought it not law. (y) It seems that the prisoner was pardoned. (z)

Cannon's case. Money held to have been obtained by robbery, there having been some constraint upon the person of the prosecutor.

But in a case where that which took place was considered as amounting to a constraint upon the person of the prosecutor, it was held that the money was obtained by robbery, though the prosecutor not having the money about him went to a friend to procure it, and though the prisoners had seen the prosecutor several hours before, had then made the charge, and had fixed a future time for receiving the money. And it was held that calling a coach for the purpose of carrying the prosecutor before a magistrate, and the prosecutor being induced to get into it amounted to a constraint upon his person, though he had no apprehension of further violence to his person than that of being carried before a magistrate. The prisoners had been with the prosecutor at ten o'clock in the morning, and had threatened to prefer the charge of an attempt to commit an unnatural crime, if he did not give them 10*l.*: one of them pretended to be an assistant police officer, and to him the prosecutor had given 10*l.* the night before. The prosecutor fixed to meet them the next morning at nine o'clock, but they came again that night at nine, and said they could not wait, and that, as the prosecutor had not 10*l.* about him, they must take him to Bow-street. He then agreed to go, and they called a coach and he got in. They then said if he would procure the money they would not prefer the charge. He went to a friend's and got 10*l.*, and gave it to them. He was there about five minutes. The prisoners went to the house with him, and waited for him in

(v) Chambre, Le Blanc, Rooke, Thomson, Grose, Heath, Hotham, McDonald, and Lord Alvanley.

(x) Graham, Lawrence, and Lord Ellenborough.

(y) Lord Ellenborough thought that the prosecutor's principal in-

judgement in the present case to part with his money was the fear of a loss of his place, and his Lordship said that he should feel no difficulty in recommending a pardon.

(z) Rex v. Elmstead, Mich. T. 1802, MS. Bayley, J.

the street. Upon the trial, the prosecutor said he was under the apprehension of being carried by force into custody, but that he did not give the money under the impression of danger to his person. The prisoners were convicted, and upon a case reserved, ten of the Judges held that the calling the coach, and getting in with the prosecutor was a forcible constraint upon him, and sufficient to constitute robbery, though he had no apprehension of further injury to his person: but five (a) of the Judges thought that some degree of force or violence was essential, and that the mere apprehension of danger to the character would not be sufficient to constitute the offence. Five (b) others of the Judges seemed to think it would. (c)

In a later case the point came again under the consideration of the Judges, and it appears now to be settled that fear of loss of character and service, upon a charge of sodomitical practices, is sufficient to constitute robbery, though the party has no fear of being taken into custody, or of punishment. The prisoner saw the prosecutor, a servant whom he knew, at his master's door, and applied to him for 5*l.* saying money he would have, and that of the prosecutor. He then demanded 1*l.* and said that if he did not instantly get it he would go in to the prosecutor's master and swear that the prosecutor wanted to take diabolical liberties with him. Then hearing some money jingle in the prosecutor's pocket he demanded it, and the prosecutor gave it him, being one shilling and some halfpence. He then inquired about the prosecutor's clothes, and swore that money he would have, or the value, before he left the house, upon which prosecutor fetched him up a coat, and he then went away. The prosecutor stated in his evidence, that he gave the property for fear of his character and place, that his fear was, that the prisoner would go in to his master, but that he had no fear of being taken into custody, or of punishment. The prisoner was convicted, and upon a case reserved, all the Judges, except Graham, B., thought that this was within Hickman's case, and that they were bound by that case, and could not properly depart from it. And Richards, C. B., Bayley, J., and Holroyd, J., expressed their opinions that Hickman's case was right, because the charge conveyed such a degree of terror as might be expected to over-power a firm and constant mind. None of the other Judges, except Graham, B., intimated a contrary opinion. And the conviction was affirmed. (d)

But parting with property upon the charge of an unnatural crime, will not make the taking a robbery, if it is parted with, not from fear of loss of character, but for the purpose of prosecuting the offender. The prisoner applied to Fry to lend him 10*s.*, and upon his refusal threatened to charge him with an unnatural crime, and got from him 1*l.* 10*s.* Fry parted with it from an anxiety that his master's family might not be disturbed, and in expectation that he might secure the prisoner: and he immediately stated the

Egerton's case proceeds upon the principle of Hickman's case, and decides that fear of loss of character and service upon a charge of sodomitical practices, is sufficient to constitute robbery, though the party has no fear of being taken into custody, or of punishment.

Fuller's case. Parting with the money for the purpose of afterwards prosecuting the offender, does not amount to robbery.

(a) Lord Ellenborough, the Chief Baron, Lawrence, Chambre, and Graham.

(b) Heath, Grose, Thomson, Le Blanc, and Wood.

(c) Rex v. Cannon, Hil. T. 1809, MS. Bayley, J., and Russ. & Ry. 146.

(d) Rex v. Egerton, Hil. T. 1819, MS. Bayley, J., and Russ. & Ry. 325.

circumstances to his master, and to a friend, and planned with them what he should do in case of the prisoner applying again. The prisoner did apply again; and Fry fixed to meet him, marked some money, engaged a constable, and having met the prisoner, gave him the money, and had him apprehended: he parted with this money in order that he might prosecute, because he knew himself innocent, and not from the threats. Upon a case reserved, the Judges held that this taking did not constitute a robbery, and the prisoner was recommended for a limited pardon. (e)

Having thus treated of the facts and circumstances necessary to constitute the crime of robbery, this chapter may be concluded by shortly adverting to some points which have been decided respecting persons aiding and abetting in this offence, and also respecting the indictment.

Of principals
and accessories.

The same general rules which prevail in other cases of principals and accessories, apply also in the case of robbery. (f) Thus if several persons come to rob a man, and they are all present, and one only actually takes the money, it is robbery in all. (g) So if A., B., and C., come to commit a robbery, and A. stand sentinel at a hedge-corner to watch if any person should come, and B. and C. commit the robbery, it will be robbery in A. also, though he was at a distance from them, and not within view. (h) And the principle of several persons engaged in one common design being in the eye of the law present when the fact is committed has been carried to a considerable extent in the case of robbery. For where three men went out to rob, and attacked a man who made his escape, and while two of them were engaged with that man, the third robber rode off and robbed another person in the same highway, without the knowledge of the two other robbers, and out of their view, and then returned to them; it appears to have been holden that all of them were guilty of this robbery, as they came together with an intent to rob, and to assist one another in so doing. (i) But where several men by agreement rode out to commit robbery, and at Hounslow one of them parted from the company, and rode away towards Colnbrook, and the others rode towards Egham, and at the distance of about three miles from Hounslow, committed a robbery; it was holden that the man who parted from the company was not guilty of this robbery, though he rode out with the others upon the same design: for he left them at Hounslow, and, as he did not fall in with them afterwards, possibly he repented of the design, but at least he did not pursue it. (k)

The presumption of a party repenting of his evil design appears to have been admitted to a greater extent in a more modern case. It appeared in evidence that the two prisoners accosted the prosecutor as he was walking along the street, by asking him, in a peremptory manner, what money he had in his pocket. Upon

(e) *Rex v Fuller*, Hil. T. 1820, MS. Bayley, J., and Russ. & Ry. 408.

(f) *Ante*, Vol. 1. Book I. Chap. 2. The punishment of principals in the second degree and accessories has been mentioned, *ante*, 61.

(g) 1 Hale 534. 1 Hawk. P. C. c. 34. s. 5.

(h) 1 Hale 534, 537.

(i) 1 Hawk. P. C. c. 34. s. 5. Pudsey's case, 1 Hale 533, 534.

(k) *Rex v. Hyde and others*, 1 Hale 537, 538.

his replying that he had only twopence halfpenny, one of the prisoners immediately said to the other, "If he really has no more, "do not take that," and turned, as if with an intention to go away: but the other prisoner stopped the prosecutor, and robbed him of the twopence halfpenny, which was all the money he had about him. But the prosecutor could not ascertain which of them it was that had used this expression, nor which of them had taken the halfpence from his pocket. The court said that this evidence went to the acquittal of both the prisoners; for if two men assault another, with intent to rob him, and one of them, before any demand of money, or offer to take it be made, repent of what he is doing, and desist from the prosecution of such intent, he cannot be involved in the guilt of his companion, who afterwards takes the money; for he changed his evil intention before the act which completes the offence was committed. That the prisoner, therefore, whichever of the two it was who thus desisted, could not be guilty of the offence charged: that one of them was guilty, but which of them personally did not appear. And, as the prosecutor could not ascertain who it was that took the property, both the prisoners must be acquitted. (l)

The indictment for robbery must state an assault upon the person; and that such assault was made *feloniously*. And where the indictment charged that the prisoner, "in and upon I. M., &c. "did make an assault, and him the said I. M. in corporal fear and "danger of his life then and there *feloniously did put*," it was holden to be defective; and that the omission of the statement of the assault having been feloniously made was not aided by the statement of the prosecutor having been feloniously put in fear and danger of his life. (m) The taking must be charged to be with violence, and against the will of the party: and the statement, in the usual form of an indictment for this offence, is, "certain "goods, &c. of the said A. B., from his person and against his "will, then and there feloniously and *violently* did steal, take, " &c." But the word *violently* is not essentially necessary: as in a case where it was objected that the indictment did not shew that the taking was done *violenter*, and that the prisoner was, therefore, entitled to his clergy, and the authority of Lord Hale was cited, (n) all the Judges, upon the point being reserved, agreed that the word *violenter* was no technical term essentially

Of the indictment.

(l) *Rex v. Richardson and Greenow*, O. B. 1785, *cor. Buller, J.*, 1 Leach 387. The court also said that it was like the *Spurwich* case, where five men were indicted for murder, and it appeared, on a special verdict, that it was murder in one, but not in the other four, but it did not appear which of the five had given the blow which caused the death; and it was ruled that as the man could not be clearly and positively ascertained, all of them must be discharged.

(m) *Rex v. Pelfryman and Randal*,

2 Leach 563.

(n) 1 Hale 534: where it is said that the indictment must run, *quod vi et armis apud B. in regia viâ ibidem, &c. 40s. in pecuniis numeratis felonice et violenter cepit à personâ*; and, therefore, if the word *violenter* be omitted in the indictment, or not proved upon the evidence, though it be in *aliâ viâ regia et felonice cepit à personâ*, it is but larceny, and the offender shall have his clergy: and Dy. 224. b. H. 17 Jac. in B. R. 2 Rol. Rep. 154. are cited.

necessary in the indictment: and that if it appeared, upon the whole, that the fact was committed with violence, it was sufficient to constitute a robbery. (o) And with respect to the authority cited, they said that Lord Hale, in the passage referred to, was inaccurate in his expression; that the definition which he gave of robbery was a felonious taking from the person with violence; and that if the fact were so described in the indictment, as to answer the definition, it came up to Lord Hale's own doctrine. (p) It is considered as uncertain whether the indictment should charge that the party was put in *fear*; though, as such statement is usual, it will be more safe to insert it. (q) But, in general, no technical description of the fact is necessary, if upon the whole it plainly appear to have been committed with violence against the will of the party. (r) And where the taking has been by a putting in fear by means of threats to charge the party with sodomitical practices, the indictments appear to have been for robberies in the usual form. (s)

Statement of
the place
where the robbery was committed.

It was formerly material to state correctly, in the indictment, whether the robbery was committed in or near the *king's highway*; and many points of much nicety arose as to the manner of such statement, and also as to what should be considered as a highway robbery. (t) But the statute 3 W. & M. c. 9. s. 1., (now repealed) relating generally to all robberies, whether in a highway, house, or elsewhere, made these points no longer necessary to be considered: and we have seen that the provision of the 7 & 8 Geo. 4. c. 29. s. 6. is quite general. (u) In a case which occurred soon after the statute of 3 W. & M. was passed, where the indictment was for a robbery near the highway, and a robbery in a house was the offence proved, it was holden by all the Judges, that as that statute took away clergy in all robberies, the prisoners should not have their clergy. (x) And so upon an indictment which charged the prisoner with robbing a person in a field, near the highway, where the jury found a verdict "guilty of the robbery, but not near the highway," it was holden, by all the Judges, that the prisoner was ousted of clergy. (y) And a case is mentioned, as having been determined upon similar principles, where the robbery was in a house in a street, hired by one of the prisoners for the purpose, but not inhabited by any one; and the indictment charged the robbery to have been committed in the dwelling-house of that prisoner. (z) It followed, therefore,

(o) Smith's case, 2 East. P. C. c. 16. s. 166. p. 783, 784.

(p) *Id. ibid.*

(q) 2 East. P. C. c. 16. s. 166. p. 783. It is not necessary that the indictment should charge that the party robbed was put in fear if it is stated that the prisoner acted *violenter*, and that the party was robbed *contra voluntatem*. Per Foster, J., 19 St. Tr. 806.

(r) 2 East. P. C. c. 16. s. 166. p. 783. s. 127. p. 708.

(s) Jones's, alias Evans's case, 2

East. P. C. c. 16. s. 150. p. 714. 1 Leach 139, *ante*, 76. and the other cases of a similar nature, cited *ante*, 80, *et sequ.*

(t) 1 Hale 535, 536. 2 East. P. C. c. 16. s. 168. p. 784, 785.

(u) *Ante*, 61.

(x) Summers's case, 1705. 2 East. P. C. c. 16. s. 68. p. 785.

(y) Wardle's case, 1800. 2 East. P. C. c. 16. s. 168. p. 785. Russ. & Ry. 9.

(z) Rex v. Darnford and Newton, O. B. 1780. 2 East. *Ibid.*

that it was not material, where the robbery was charged to have been committed in a dwelling-house, that the ownership of the house should be correctly stated. Thus, where the prisoner was convicted upon an indictment; which charged him with robbing a person in the dwelling-house of one Aaron Wilday, and it had not appeared who was the owner of the house in which the fact was committed, the Judges held the conviction proper. (a) And again where the prisoner was indicted for robbing a person in the dwelling-house of *Joseph Johnstone*, and it appeared, upon the evidence, that the prisoner, whose name was Susannah Johnstone, had committed the robbery in the house of her husband, but the Christian name of the husband could not be proved; the prisoner being convicted upon this evidence, the Judges were of opinion that the conviction was proper. (b)

In a case of an indictment for a highway robbery on the person of *Elizabeth Hudson*, it appeared that such was the name of the prosecutrix at the time the robbery was committed, but that after the robbery, and at the time the bill was presented to the grand jury, and found by them, she was married to a person of the name of Heywood; and, upon these facts, it was objected that the indictment was erroneous. But Gould, J., and Eyre, C. B., held that the description of the prosecutrix, in this case, by her maiden name, was sufficient. (c)

Indictment : using the maiden name of the prosecutrix, where she had married after the robbery, holden to be proper.

In robbery from the person, as in other complicated or aggravated larcenies, the prisoner may be acquitted of the circumstances of aggravation, namely, the fear or violence, and found guilty of the simple larceny. (d)

The verdict may be, guilty of simple larceny only.

When the prisoner is found guilty of the robbery, the punishment is capital; the offence being, as we have seen, expressly so punishable by the recent statute. 7 & 8 Geo. 4. c. 29. s. 6. (e)

Punishment.

(a) *Pye's case*, *Warwick*, 1790, *cor.* Thomson, B., and in *East. T.* 1790. 2 *East. P. C.* c. 16. s. 168. p. 785, 786. 1 *Leach* 382. note (a)

(b) *Johnstone's case*, 1793, *cor.* Ashhurst J., and in *East. T.* 1793. 2 *East. P. C.* c. 16. s. 168. p. 786. *Russ. & Ry.* 10. in the note.

(c) *Turner's case*, 1 *Leach* 336.

(d) 2 *East. P. C.* c. 16. s. 167. p. 784. But where a special verdict was found, which stated facts amounting only to a larceny, as the only doubt

referred to the court was whether the prisoners were or were not guilty of the felony and robbery charged against them in the indictment; the Judges thought that judgment of larceny could not be given upon such finding. They, therefore, remanded the prisoners to be tried upon another indictment. *Rex v. Francis*, *ante*, 66.

(e) It was formerly excluded from clergy by several statutes now repealed. *Ante*, p. 62. note (f)

CHAPTER THE NINTH.

OF LARCENY.

WE may now consider of the offence called *larceny*, a word formed by contraction, or rather, as it has been said, by abuse, from *latrocinium*, and used to signify the violation of the property of another by theft, where the property is not taken from the house, curtilage, &c. or the person of the owner, under such circumstances of aggravation as have been noticed in the preceding chapters of this book. Formerly there was a distinction of this offence into grand larceny and petit larceny, the offence being grand larceny when the value of the property taken was above twelve-pence, and petit larceny, when the value was only twelve-pence, or under that sum. (a) But the late statute 7 & 8 Geo. 4. c. 29. s. 2. enacts, "that the distinction between grand larceny and petty larceny shall be abolished, and every larceny, whatever be the value of the property stolen, shall be deemed to be of the same nature, and shall be subject to the same incidents in all respects as grand larceny was before the commencement of this act; and every court whose power as to the trial of larceny was before the commencement of this act limited to petty larceny, shall have power to try every case of larceny, the punishment of which cannot exceed the punishment hereinafter mentioned for simple larceny, and also to try all accessories to such larceny."

Punishments
for simple
larceny.

The third section of this statute enacts, "that every person convicted of simple larceny, or of any felony hereby made punishable like simple larceny, shall (except in the cases herein-after otherwise provided for) be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years, and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit) in addition to such imprisonment." The fourth section contains a general enactment with regard to the place and mode of imprisonment for all indictable offences punishable under the act, by which the court is empowered to sentence the offender to be imprisoned, or to be imprisoned and kept to hard labour in the common gaol or

(a) Stat. West. 1. (3 Edw. 1.) c. 15. This statute made regulations as to such offenders as were to be mainpernable, and mentions larceny as of two kinds, namely, *grand* and *petit*—

grand larceny, when the thing stolen was above the value of twelve-pence; and petit larceny, when of the value of twelve-pence, or under.

house of correction, and also to direct that the offender shall be kept in solitary confinement for the whole or any portion or portions of such imprisonment, or of such imprisonment with hard labour, as to the court in its discretion shall seem meet.

This statute also contains (s. 61.) general provisions for the punishment of principals in the second degree and accessories. It enacts, "that in the case of every felony punishable under this act, every principal in the second degree, and every accessory before the fact, shall be punishable with death or otherwise, in the same manner as the principal in the first degree is by this act punishable; and every accessory after the fact to any felony punishable under this act, (except only a receiver of stolen property) shall on conviction be liable to be imprisoned for any term not exceeding two years." (b)

Punishment of principals in the second degree and accessories.

The offence and punishment of receivers of stolen property will be mentioned in a subsequent chapter.

The definition of the offence of larceny is thus given by an ancient writer. "*Furtum est, secundum leges, contractatio rei alienæ fraudulenta, cum animo furandi, invito illo domino cujus res illa fuerit. Cum animo dico, quia sine animo furandi non committitur.*" (c) In subsequent definitions the taking of the property has been stated to be "felonious;" (d) which expression has been rendered as signifying a taking *animo furandi*, or, as the civil law expresses it, *lucris causâ*. (e) In a late work of great learning and research, larceny is defined at large to be "the wrongful or fraudulent taking and carrying away by any person of the mere personal goods of another, from any place, with a felonious intent to convert them to his (the taker's) own use, and make them his own property, without the consent of the owner." (f) And in a case of recent occurrence, which was reserved for the consideration of the twelve Judges, the learned Judge who delivered their opinion said, that the true meaning of larceny is, "the felonious taking the property of another without his consent, and against his will, with intent to convert it to the use of the taker." (g)

Definition of larceny.

With respect to a taking, *lucris causâ*, it is stated that upon the debate in a case which underwent great discussion one of the learned Judges defined larceny as being "a wrongful taking of goods with intent to spoil the owner of them, *causâ lucris*;" but if this motive be a necessary ingredient, it appears that it is not

Of the taking *lucris causâ*.

(b) For the proceedings for the trial of accessories, see 7 Geo. 4. c. 64. ss. 9, 10, 11. *Addenda* to Vol. 1.

(c) Bract. Lib. iii. c. 32. p. 150. So Glanvil, in words nearly similar, says, "*Furtum est tractatio rei alienæ fraudulenta, animo furandi, invito illo cujus res illa fuerit.*" Glanv. lib. x. c. 13. And see Brit. c. 15. p. 22. Flet. lib. i. c. 38. p. 54. 3 Inst. 107.

(d) 3 Inst. 107. 1 Hale 503. 1 Hawk. P. C. c. 33. 4 Black. Com. 229.

(e) 4 Black. Com. 232. 2 East. P. C. c. 16. s. 2. p. 553. citing Just. Inst. lib. iv. tit. 1. which, it is observed, seems to go further than the common law in the following definition—*furtum est contractatio fraudulosa lucris faciendi causâ, vel ipsius rei, vel etiam usus ejus possessionisve.*

(f) 2 East. P. C. c. 16. s. 2. p. 553.

(g) By Grose, J., in Hammond's case, 2 Leach 1089.

confined to the acquisition of pecuniary advantage, or to the taking of the thing stolen for the sake of its worth. Thus a taking with intent to destroy is sufficient to constitute larceny if it be done to effect an object of supposed advantage to the party committing the offence, or to a third person. The prisoner forced open a stable door, took out a horse, led it about a mile to an old coal pit, and there backed it down and killed it, his object being that the horse might not contribute to furnish evidence against one Howorth who was under a charge for stealing it: he had no intention of deriving any pecuniary benefit from taking the horse. Thomson, C. B., saved the point, whether a taking with this intent constituted larceny: and, upon conference, six Judges against five held it not essential that the taking should be *lucri causâ*: they thought a taking, *fraudulenter*, with intent wholly to deprive the owner of the property, sufficient; but some of the six also thought that the object of protecting Howorth might be deemed a benefit or *lucrum*. (h)

It has also been decided, that clandestinely taking a master's corn, though to give the master's horses, is felony: especially if by so feeding them the servant's labour is likely to be diminished. The prisoners had the care of one of their master's teams: the master allowed what beans he thought fit, but they, by means of a false key, took from the granary additional quantities. They were indicted for stealing two bushels, and the jury found that they took them to give their master's horses. A case was reserved upon the question whether this was felony; and, after consideration, eight Judges out of eleven held that it was, and that the purpose to which the prisoners intended to apply the beans did not vary the case; and further, as it was alleged that the additional beans would diminish the work of the men who had to look after the horses, so that the master not only lost his beans, or had them applied to the injury of his horses, but the men's labour was lessened, it appeared that the *lucri causâ* to give themselves ease, was an ingredient in the case. (i)

It will be attempted to notice the principal points which have been decided concerning the offence of larceny, in an enquiry, I. As to the taking and carrying away of personal goods necessary to constitute this offence; II. As to the personal goods in respect of which it may be committed; III. As to the ownership of the goods; and, IV. As to the indictment, trial, and punishment.

(A) *Rex v. Cabbage*, East. T. 1815, East. T. 1816. MS. Bayley, J., and MS. Bayley, J., and Russ. & Ry. 292. Russ. & Ry. 307.

(i) *Rex v. Morfit and another*,

SECTION I.

Of the taking and carrying away of the personal goods of another necessary to constitute the offence of Larceny.

THERE must be an actual taking or severance of the goods from the possession of the owner, on the ground that larceny includes a trespass. If, therefore, there be no trespass in taking goods, there can be no felony in carrying them away. (*l*) But the taking need not be by the very hand of the party accused: so that if a thief fraudulently procure a person innocent of any felonious intent to take the goods for him, (as if he should procure an infant within the age of discretion to steal the goods) his offence will be the same as if he had taken the goods himself; and it should be so charged. (*m*)

Of the actual taking and trespass.

It appears to be well settled, that the felony lies in the very first act of removing the property: and therefore, that the least removing of the thing taken from the place where it was before, with an intent to steal it, is a sufficient asportation, though it be not quite carried away. (*n*) Thus, where a guest who had taken the sheets from his bed, with an intent to steal them, and carried them into the hall, was apprehended before he could get out of the house, it was holden that he was guilty of larceny. (*o*) And a like decision was made, where a person who had taken a horse in a close, with an intent to steal him, was apprehended before he could get him out of the close; (*p*) and also, where a person intending to steal plate took it out of a trunk wherein it had been deposited and laid it on the floor, but was surprised before he could carry it away. (*q*) And in a more modern case it was holden by all the Judges, that the removal of a parcel from the head to the tail of a waggon, with an intent to steal it, was a sufficient asportation to constitute larceny. (*r*) But where a parcel was not removed, its position only being altered on the spot where it lay, the Judges came to a different conclusion. The indictment against the prisoner was for stealing a wrapper and four pieces of linen cloth; and the facts proved were, that the pieces of linen cloth were packed up in the wrapper in the common form of a long square, and laid lengthways in a waggon; that the prisoner set the packages on one end in the waggon for the greater convenience of

Any removal of the goods with the felonious intent, is a sufficient carrying away.

But there must be an entire possession of the goods by the thief, though but for an instant.

(*l*) Kel. 24. 1 Hawk. P. C. c. 38. s. 1. 3 Bac. Ab. *Felony* (C). 2 East. P. C. c. 16. s. 3. p. 554.

(*m*) 1 Hale 514. 2 East. P. C. c. 16. s. 3. p. 555. So in the crime of murder, if A. procure B., an idiot or lunatic, to kill C., A. is guilty of the murder as principal, and B. is merely an instrument. *Ante*, Vol. 1. p. 423.

(*n*) 3 Inst. 108. 1 Hawk. P. C. c. 33. s. 25. 3 Bac. Ab. *Felony* (D). 4 Black. Com. 231. 2 East. P. C. c. 16. s. 4. p. 555.

(*o*) 3 Inst. 108. 1 Hale 507, 508.

(*p*) 3 Inst. 109.

(*q*) Simson's case, Kel. 31.

(*r*) Goslet's case, 1 Leach 230.

taking the linen out, and cut the wrapper all the way down for that purpose ; but that he was discovered and apprehended before he had taken any thing out of it ; and all the Judges agreed, upon this case being saved for their consideration, that it did not amount to larceny, though the intention of the prisoner to steal was manifest. They held, that some removal of the goods from the place where they were was necessary ; and that the party accused must, for the instant at least, have the entire and absolute possession of them. (s) But if every part of the thing is removed from the space that part occupied, though the whole thing is not removed from the whole space which the whole thing occupied, the asportation will be sufficient. Thus where the prisoner had lifted up a bag from the bottom of the boot of a coach, and was detected before he got it out of the boot ; and it did not appear that the bag was entirely removed from the space which it at first occupied in the boot ; but the raising it from the bottom had completely removed each part of it from the space which that specific part occupied : the Judges held, upon a case reserved, that there was a complete asportavit. (t) And by the same rule, drawing a sword partly out of the scabbard, will constitute a complete asportavit.

And there
must be a se-
verance.

In a case where goods in a shop were tied to a string, which was fastened by one end to the bottom of the counter, and a thief took up the goods and carried them towards the door, as far as the string would permit, and was then stopped ; this was holden not to be a felony, because there was no severance. (u) And in a more ancient case, where a thief took from the pocket of the owner a purse, to the strings of which some keys were tied, and was apprehended with the purse in her hand, but still hanging by means of the keys to the pocket of the owner, it was ruled not to be larceny ; on the ground that as the purse still hung to the pocket of the owner by means of the strings and keys, it was in law still in his possession. (x)

Where there
has been a suf-
ficient taking,
the offence
will not be
purged by re-
turning the
goods.
Of the *animus
furandi*.

But where there has once been a sufficient taking of the goods by the thief, the offence is completed, and will not be purged by a returning of the goods, as has been already shewn in the case of a taking by robbery. (y)

One of the most material considerations respecting the taking and carrying away of goods necessary to constitute larceny is whether the fact were done *animo furandi*—"cum animo dico, "quia sine animo furandi non committitur." () The ordinary discovery of such felonious intent is where the party commits the fact clandestinely, or, upon its being laid to his charge, denies it : but this is by no means the only criterion of criminality ; for in cases that may amount to larceny, the variety of circumstances is so great, and the complication thereof so mingled, that it is im-

(s) Cherry's case, *Oxford Lent Ass.* 1781, and *East. T.* 1781. 2 *East. P. C. c.* 16. s. 4. p. 556. 1 *Leach* 236, 237, note (a).

(t) *Rex v. Walsh*, *East. T.* 1824. *MS. Bayley, J., and Ry. & Mood. C. C.* 14.

(u) *Anon. cor. Eyre, B.*, 2 *East. P. C. c.* 16. s. 4. p. 556.

(x) *Wilkinson's case*, 1 *Hale* 508. And see also as to the possession of the property by the thief, in cases of robbery, *Lapier's case*, *ante*, 63. and *Farrel's case*, 63.

(y) *Ante*, 63. And see 2 *East. P. C. c.* 16. s. 5. p. 557.

(z) *Ante*, 93.

possible to recount all those which may evidence a felonious intent, or *animum furandi*. It is useful to refer to those points which have already come under consideration : but new cases will continually occur, in which the felonious intent must be left, upon the particular circumstances, to the due and attentive consideration of the court and jury, who will not forget the excellent rule, that in doubtful cases it is proper rather to incline to acquittal than conviction. (a)

It is clear that the taking, though wrongful, may only amount to a trespass. Thus, if a man takes away the goods of another openly before him or other persons, otherwise than by apparent robbery, this carries with it an evidence only of a trespass, because done openly in the presence of the owner or of other persons who are known to the owner. (b) And the evidence of its being only a trespass will be strong, where a person, having possessed himself of the goods of another, avows the fact before he is questioned. (c) Again, if a man leaves a harrow or plough in a field, and another person who has land in the same field uses those instruments, and having done with them either returns them to the place where they were, or acquaints the owner with his having taken them, this is no felony, but at most a trespass. (d) And the same conclusion must be drawn where a man, having cattle upon a common which he cannot readily find, takes his neighbour's horse which is depasturing on the common, rides about upon it to find his cattle, and, when he has done with it, turns it again upon the common. (e) But the case will not be so clear where the property is taken without the privity or leave of the owner, and no intention to return it is manifested by the party by whom it was taken.

In a case where two men were indicted for stealing a mare and a gelding, it appeared that the prisoners went to the stables of the prosecutor (who was an innkeeper at a place called Petty France), in the night-time, opened them and took out the mare and the gelding, and rode on them to Lechdale, a place above thirty miles off, where they took them to different inns, and left them in the care of the ostlers, directing the ostlers to clean and feed them, and saying that they should return in three hours : and it appeared also that in the course of the same day the prisoners were taken at a distance of fourteen miles from Lechdale, walking towards Farringdon in Berkshire, in a direction from Lechdale. Upon these facts, the jury, having been directed to consider whether the prisoners, when they took the mare and gelding, intended to make any further use of them than to ride them for the purpose of assisting them on their journey towards the place where they were going, and then to leave them to be recovered by the owner or not as it might turn out, found the prisoners guilty ; but they added that they were of opinion, that the prisoners meant merely to ride the horses to Lechdale, and to leave them there ; and had no intention to return for them, or to make any further use of them. At a conference of the Judges this

Cases where the taking is only a trespass.

Phillips and Strong's case. The prisoners took two horses from a stable, rode them to a place at a considerable distance, and there left them, proceeding on their journey on foot ; and the jury having found that the horses were taken by the prisoners only in order to ride them, and afterwards leave them, it was holden to be trespass. not l^e

(a) 1 Hale 509. 4 Black. Com. 232.

(d) 1 Hale 500. 4 Black. Com. 232.

(b) 1 Hale 509.

(e) 1 Hale 509.

(c) 2 East. P. C. c. 16. s. 98. p. 661.

finding was considered ; when one of them (*f*) thought that the case amounted to felony, because there was no intention to return the horses to the owner, but, for ought the prisoners concerned themselves, to deprive him of them : and another of the Judges appears to have entertained doubts upon the case. (*g*) But the rest of the Judges held it to be only a trespass, and no felony, as there was no intention in the prisoners to change the property, or make it their own, but only to use it for the particular purpose of saving their labour in travelling. They agreed, however, that it was a question for the jury ; and that, if the jury had found the prisoners guilty generally upon this evidence, the verdict could not have been questioned. (*h*)

Clandestinely taking away articles in order to induce the owner, a girl, to fetch them and thereby to give the party an opportunity to solicit her to commit fornication with him is not a felonious taking. The prisoner took from a house in the night a young girl's bonnet, and some other articles of her dress, and carried them to a hay-mow where he had twice had connection with her ; and the jury thought that he only took them in order that she might again go to the mow, and that he might have another opportunity of soliciting her to repeat the connection. Upon a case reserved the Judges thought the taking with such an intent was not felonious and the prisoner was pardoned. (*i*)

The taking may be by mistake, without any *animus furandi*.

A taking of another's property may also be by mistake, arising from heedlessness or accident, in which the *animus furandi* has no part. Thus, if the sheep of A. stray from his flock to the flock of B., and B. drive them along with his own flock, and, by mistake, without knowing or taking heed of the difference, shear them, it is no felony. But if B. knew them to be the sheep of another person, and tried to conceal that fact ; if, for instance, finding another's mark upon them, he defaced it, and put his own mark upon them ; this would be evidence of felony. (*k*) And a like conclusion may be drawn, where a party, having possession of another's property, appears desirous of concealing it, or of preventing the inspection of the owner, or of any person who may make the discovery ; or where, being asked, he denies having the property, though it is clear that he knew of its being in his possession. On the other hand, a mode of conduct of a different description in these several respects will be evidence to rebut any felonious intent. (*l*)

The *animus furandi* may also be negatived by a claim of right.

The circumstance of the goods being taken on a claim of right may also negative any *animus furandi*. In one instance, indeed, a man may be guilty of felony in taking his own goods ; namely, where, having bailed them to another person, he afterwards steals

(*f*) Grose, J.

(*g*) Lord Alvanley. It appears that his lordship, who had been recently called to the bench of C. B. not having been present when the case was first under consideration, declined giving any express opinion. 2 East: P. C. c. 16. s. 98. p. 663. note (*a*).

(*h*) Rex v. Philipps and Strong, *con*.

Lawrence, J., Gloucester Spr. Ass. 1801. and East. T. and Trin. T. 1801. 2 East. P. C. c. 16. s. 98. p. 662, 663.

(*i*) Rex v. Dickinson, Mich. T. 1820. MS. Bayley, J., and Russ. & Ry, 420.

(*k*) 1 Hale 506, 507.

(*l*) 2 East. P. C. c. 16. s. 97. p. 661.

them from such person in order to charge him for them in an action, or robs the other person of them in order to charge the hundred. (m) But regularly a man cannot commit felony of goods wherein he has a property. Thus, if A. take away the trees of B., and cut them into boards; or, if A. take the cloth of B. and make it into a doublet; B. may take the boards or the cloth, and it will not be felony. (n) So if A. take the hay or corn of B., and mingle it with his own heap or cock, or take B.'s cloth, and embroider it; B. may retake the whole heap of corn or cock of hay (at least so much of them as cannot be easily distinguished from his own), and the garment with the embroidery; and such retaking will be no felony. (o)

If the owner of land upon which a horse has strayed take the horse *damage feasant*, or if the lord of a manor seize a horse as an estray, though perchance he has no title so to do, yet as the act is not done *felleo animo*, it will not be felony. (p) But any act of this kind is open to proof of a felonious intention; so that if new marks are given to the horse to disguise him, or his old marks are altered, these will be considered as presumptive circumstances of a thievish intent. (q)

In a case where, after a seizure of uncustomed goods, some persons broke at night into the house where they were deposited, with a design to retake them for the benefit of the former owner, it was holden that any presumption of a felonious intent to steal, as laid in the indictment, (which was for a burglary) was rebutted by the fact which the jury found, namely, that the prisoners intended to retake the goods on the behalf of their former owner. (r)

The following observations on the subject of a felonious taking of corn by *gleaning*, are made in a modern work in which much useful matter is collected:—"An idea very universally prevails among the lower classes of the community, that they have a right to glean, that is, to take from off the land the corn that remains thereon after the harvest has been gotten in; than which notion nothing can be more erroneous. By custom, indeed, such a right may possibly in some particular places exist; and the laudable kindness of tenants generally induces them to permit the poor to collect the corn they have left upon the land, and to appropriate it to their own use. As a right, however, it has no more existence than a right to take the tenant's furniture from out of his messuage, and the pillage in the one case is as much felony as the plunder would be in the other: for the act is not simply a trespass, but a felony; and the compiler well remembers a conviction at the Old Bailey, on an indictment found for the exercise of this supposed right. The parties were tried before Mr. Justice Rooke, (if he mistake not) about six years ago." (s)

Of taking corn by gleaning.

But upon this it is submitted, that though the right to take

(m) 1 Hale 513. 2 East. P. C. c. 16. s. 95. p. 659.
 16. s. 95. p. 659.
 (n) 1 Hale 513.
 (o) 1 Hale 513. 2 East. P. C. c. 16. s. 95. p. 659.
 16. s. 95. p. 659.
 (p) 1 Hale 506, 509.
 (q) 2 East. P. C. c. 16. s. 95. p. 659.
 (r) Rex v. Knight and Rofey, 2 East. P. C. c. 15. s. 22. p. 510. and c. 16. s. 95. p. 659.
 (s) Woodf. Landlord and Tenant, Chap. IX. p. 242. (ed. 1814).

corn by gleaning has no existence, except possibly by custom in some particular places, (t) such a taking will not necessarily amount to a felony. Undoubtedly it will be an act open, like other acts of trespass which have been mentioned, to proof of a felonious intention, upon which it is peculiarly the province of the jury to determine; but it can hardly be contended, that such taking will amount to larceny, if it should appear to have been merely a taking of the corn left on the ground after the crop had been carried, and to have been done openly, under a claim of right not altogether without colour, though not capable of being established by proof, or to have been done under an apparent sanction, arising from former similar acts of the same individual, or of others in the neighbourhood, having been allowed by the occupier of the land.

Where there is any doubt as to the right, the court will direct an acquittal.

It has been observed, with respect to cases where goods have been taken on a claim of right, that if there be any fair pretence of property or right in the prisoner, or if it be brought into doubt at all, the court will direct an acquittal; as it is not fit that such disputes should be settled in a manner to bring men's lives into jeopardy. (u) The master of a *Prussian* vessel captured by a British ship, and carried into the port of *Weymouth*, was held not to be guilty of larceny in taking goods from the vessel under the particular circumstances; there being no evidence that he took them for the purpose of converting them to his own private use. (x)

Where the taking is by finding, it will not amount to larceny, even though there be the *animus furandi*. But this doctrine must be understood with great limitation.

There is one case in which it has been holden, that the taking will not amount to a larceny, though it be accompanied with the *animus furandi*; namely, where the taking is by a *finding* of the property. Thus, it is laid down in the books, that if one lose his goods, and another find them, though he convert them, *animo furandi*, to his own use, yet it is no larceny, for the first taking was lawful. (y) And again; if A. find the purse of B. in the highway, and take it and carry it away, with all the circumstances that usually prove the *animus furandi*, as denying it, or secreting it, yet it is not felony. (z) But though, where the particular circumstances of any case furnish a presumption of an intended dereliction of treasure trove, or waif, or stray, on the part of the owner, no larceny can be committed by taking them before seizure by the lord; yet in other cases the doctrine of a taking by finding must be admitted with great limitation, and must be understood to apply only where the finder really believes the goods to have been lost by the owner, and does not colour a felonious taking under such a pretence. (a) It will not avail, therefore, where a man's goods being in a place in which ordinarily and lawfully they are or may be placed, a person takes them *animo furandi*. (b) And, even if the place where the goods are found is not one in which ordinarily they would be deposited, circumstances may shew the

(t) *Steele v. Houghton and Wife*, 1 Hen. Black. 53. *Rex v. Price*, 4 Burr. 1926.

(u) 2 East. P. C. c. 16. s. 95. p. 659.
(x) *Rex v. Van-Muyen, Rum. & Ry.* 118.

(y) 3 Inst. 108. 1 Hawk. P. C. c. 33. s. 2. 3 Bac. Ab. *Felony* (C).

(z) 1 Hale 506.

(a) 1 Hale 506. 2 East. P. C. c. 16.

s. 99. p. 664.

(b) 1 Hale 506.

taking to have been felonious. Thus, if a man should hide a purse of money in a corn-mow, and his servant finding it should take part of it, the taking will be felony, if it appear by circumstances that the servant knew that his master laid it there; but in such a case it would be required that the circumstances should be pregnant, otherwise it might reasonably be interpreted to be a bare finding, on account of the place being so unusual for such a deposit. (c) And the taking of another man's horse from his own or his neighbour's ground or common, with intent to steal it, is felony. (d)

The following cases also further shew that the taking *animo furandi* of goods which have been found by the party may amount to larceny. A gentleman left a trunk in a hackney coach, and the coachman took and converted it to his own use. This was holden to be felony, on the ground that the coachman must have known where he took up the gentleman and his trunk, and where he set him down; and that he ought therefore to have restored it to him. (e) In a late case, where the prisoner was indicted for stealing a box, containing a quantity of wearing apparel and two bonds, it appeared that he was a hackney coachman, and that he took up the prosecutor with several trunks and packages, amongst which was the box in question, at an hotel in the Adelphi, and set him down in Orchard-street, Portman-square, where all the articles were taken out of the coach by the prisoner and the prosecutor's servant, except this box, which was corded, and had been deposited under the seat of the coach. The prisoner received his fare and drove away, after which in a few minutes the box was missed: but the prisoner and the coach were quite gone; and it was not till several days had elapsed, and after hand-bills had been dispersed and advertisements inserted in the public-prints, offering a reward to any person who should bring home the box, that the prisoner was apprehended. The box was then found at the house of a Jew, to which the prisoner said he had taken it: but it was uncorded, the hasps of it were forced off, and it contained only a part of the property which was in it when it was lost, the two bonds and several of the articles mentioned in the indictment having been taken away. The case was left to the jury, to consider whether they were satisfied that the prisoner had uncorded the box, not merely from a natural, though idle curiosity, but with an intention to embezzle some part of its contents; and they were of opinion that he uncorded the box and destroyed the papers with an intent to embezzle the goods found in the box. They accordingly found him guilty; and the case being reserved for the consideration of the twelve Judges, a majority of them were of opinion that the conviction was proper. (f)

Another case of a larceny by a hackney coachman of a parcel left in his coach may be here mentioned, though the circumstances of it appear to have left but little room for the defence that the

Cases of hackney coachmen taking articles left in their coaches.
Lamb's case.

Wynne's case.

Scarp's case.

(c) 1 Hale 507.

(d) 1 Hale 506. 2 East. P. C. c. 16. s. 99. p. 664.

(e) Lamb's case, O. B. 1694. 2 East.

P. C. c. 16. s. 99. p. 664.

(f) Wynne's case, O. B. 1786, cor. Eyre, B., and East. T. 1786. 1 Leach 413. 2 East. P. C. c. 16. s. 99. p. 664.

prisoner obtained the goods by *finding*. The prisoner was indicted for stealing a parcel of calico, and other articles the property of Sarah Dixon. The prosecutrix hired him to drive her from her house to a linendraper's shop, where she purchased the articles named in the indictment; which were tied up in a parcel, and put into the coach. The prisoner then drove the prosecutrix back to her house; and, on getting out of the coach, she ordered him to give the parcel to her servant; but this he neglected to do. The prosecutrix went into the parlour of her house; but returned very shortly to the street-door and paid the coachman his fare; upon which he drove away. Upon the loss of the things being discovered, they were advertised, and a reward offered to any person who should restore them; but without effect. A few days afterwards the prosecutrix met the prisoner; but he denied all knowledge of her person, or of the things, or of his ever having had such a fare, and said that he had only driven the coach two days. The parcel, however, was traced to the prisoner's possession, and it appeared that it had been opened, and three yards taken off from the piece of calico. The prisoner in his defence acknowledged that he had driven the prosecutrix from her house to the linendraper's and back again; but he denied that she ever desired him to deliver the parcel to her servant. Upon this evidence the prisoner was convicted. (g)

Cases of bank-notes, &c. found by the prisoners, and converted to their own use.

The doctrine as to a felonious taking of goods, which have been *found* by the party, was further confirmed in two more recent cases. In the first of these cases it appeared that a pocket-book containing bank-notes had been found by the prisoner in the highway, and afterwards converted by him to his own use. Upon which Lawrence, J., observed, that if the party finding property in such manner knows the owner of it, or if there be any mark upon it by which the owner can be ascertained, and the party, instead of restoring the property, converts it to his own use, such conversion will constitute a felonious taking. (h) And in the subsequent case the two prisoners (father and son) were convicted of stealing a bill of exchange, upon evidence of their having found and converted it to their own use, by endeavouring to negotiate it. Gibbs, J., stated to the jury, that it was the duty of every man who found the property of another to use all diligence to find the owner, and not to conceal the property (which was actually stealing it,) and appropriate it to his own use. (i).

Conversion of a large sum of money, with a felonious intent, which was found in a bureau delivered to a carpenter to be repaired.

A singular case occurred at no very distant period, of a conversion, with a felonious intent, of a large sum of money found in a bureau, which had been delivered to a carpenter, for the purpose of being repaired. The point arose in the Court of Chancery upon the following facts. Ann Cartwright died possessed of the bureau, in a secret part of which she had concealed nine hundred guineas *in specie*. After her death, Richard Cartwright, her personal representative, lent the bureau to his brother Henry; who took it

(g) Sears's case, *cor.* Ashhurst, J., *ford* Sum. Ass. 1804, MS. Old Bailey, 1789. 1 Leach 415, note

(h) Rex v. James, and Barnabas Walters, *cor.* Gibbs, J., *Warwick* Sum. Ass. 1812.

(i) Anon. *cor.* Lawrence, J., *Staff*

to the East Indies and brought it back, without the contents of it being discovered. It was then sold to a person named Dick for three guineas, who delivered it to one Green a carpenter, for the purpose of repairing it. Green employed a person named Hillingworth, who found out the money. Hillingworth received only a guinea for his trouble; but, in consequence of his discovery, the whole sum of nine hundred guineas was secreted by Green, by Green's wife, and by one Elizabeth Sharpe, and converted to their own use. On these suggestions, Cartwright, the personal representative of the original owner of the bureau, filed a bill of discovery against Green and his wife, and Mrs. Sharpe; in which bill Dick joined, but did not claim any of the money on his own account; and the defendants demurred to the bill on the ground that an answer to the discovery sought might subject them to criminal punishment. After the argument upon this demurrer, the Lord Chancellor said, that the real question was, whether the bill charged a felony, and that the distinctions upon that point were so extremely nice, that he should not trust himself to say any thing upon them until he had seen all the cases, and consulted some of the Judges. Some time afterwards his Lordship delivered his opinion, and said—"I have looked into the books, and have talked with some of the Judges and others; and I have not found in any one person a doubt that this is a felony. To constitute felony, there must, of necessity be a felonious taking. Breach of trust will not do. But from all the cases in Hawkins, there is no doubt that this bureau being delivered to Green, for no other purpose than to repair, if he broke open any part which it was not necessary to touch for the purpose of repair, with an intention to take and appropriate to his own use what he should find, that is a felonious taking, within the principle of all the modern cases; as not being warranted by the purpose for which it was delivered. If a pocket-book containing bank-notes were left in the pocket of a coat sent to be mended, and the tailor took the pocket-book out of the pocket, and the notes out of the pocket-book, there is not the least doubt that it is a felony. So, if the pocket-book was left in a Hackney-coach, if ten people were in the coach in the course of the day, and the coachman did not know to which of them it belonged, he acquiesces it by finding it certainly; but not being intrusted with it for the purpose of opening it, that is felony, according to the modern cases. There is a vast number of other cases. Those with whom I have conversed upon this point, who are of very high authority, have no doubt upon it." (j)

In cases of this nature, where the taking was by *finding*, some of the strongest circumstances to rebut the implication that such taking was felonious, will be those which shew that the party made it known that he had found the property, so as to make himself responsible for the value, in case he should be called upon by the owner; or those which shew that he endeavoured to discover the true owner, and kept the goods till it might reasonably be supposed that the true owner could not be found. (k)

(j) *Cartwright v. Green*, 8 Vez. 405.
2 Leach 952.

(k) 2 East. P. C. c. 16. s. 92. p. 665.

The felonious intent may be negatived as to one of the parties where it appears that his object was to effect the apprehension of the others, though he had concerted the commission of the felony, with a view to a reward.

Where there is clearly the *animus furandi* in some of the parties concerned in a felonious taking, it may be negatived as to another party, if it appear that such other party had a different object in view from that of obtaining any share of the stolen property. John Donally was indicted for a burglary in the house of a Mr. Poole, and George Vaughan as accessory before and after the fact to the "said felony and burglary." It appeared that Donally, at the instigation of Vaughan, who was in the employment of the Police office at Bow-street, had concerted, with three other men, to rob the house of Mr. Poole, and that it was agreed that Vaughan and another officer should lie in wait to apprehend the three other men, and that the reward for their conviction should be divided amongst them. It further appeared, that Vaughan had told Mr. Poole that his house would be robbed that night, desiring him to mark a piece of cloth, and leave it on the counter, to take care to fasten the latch of the door, and to make no resistance, as he should not lose any thing; to which Poole consented, and left the house with Vaughan and the other officer to watch; which they did in a passage on the opposite side of the street. Mr. Poole's house was robbed by Donally and the three other men; and the three men who accompanied Donally were almost immediately apprehended by Vaughan and Barrett, and had been tried at a former sessions at the Old Bailey for burglary; but were convicted only of stealing in the dwelling-house to the amount of 40s. in consequence of Mr. Poole's evidence as to its being possible, at the time the robbery was committed to see a person's face by the light of the day. Upon the present indictment against Donally and Vaughan, the jury acquitted Donally of the burglary, but found him guilty of stealing in the dwelling-house to the value laid in the indictment of 5*l.*, and Vaughan as accessory before and after the commission of the said felony and stealing in the dwelling-house. Upon this finding it was objected, that this could not be larceny in Donally, because not done *animo furandi*; and further it was objected on behalf of Vaughan, that as the indictment was against him as accessory to a burglary committed by Donally, and as the jury had acquitted the principal of the burglary, the charge against the accessory must necessarily fail. The learned Judge also doubted, with respect to Vaughan, whether he could be said to incite or procure Donally to commit an offence where he engaged him to take the part of apparently joining in it, for the purpose of apprehending the offenders. The case was reserved for the consideration of the Judges, and argued before them in Michaelmas Term, 1816. All the learned Judges were present, and ten of them, namely, Gibbs, C. J., Macdonald, C. B., Graham, B., Wood, B., Bayley, J., Dallas, J., Richards, B., Park, J., Abbott, J., and Burrough, J., held the conviction wrong. They were of opinion, that as Donally was not present to aid or assist, (though the other offenders thought he was) but to detect, and as he had no intent that the felony should be successful, he had not the felonious intention necessary to make him a principal, although he acted from a bad motive, viz., the reward. But several of the Judges seemed to think that he was liable to be indicted as an accessory before the fact. Lord Ellenborough, and Holroyd, J.,

thought the conviction right; that although there was a clear intention that the felony should be discovered, yet there was another intention not inconsistent with the former, viz., that the felony should at all events be committed: and the presence of Donally did in fact aid and assist and countenance the commission of the felony. (l)

Besides the *animus furandi*, it is necessary that the taking of the goods should also be without the consent of the owner, "*invito domino*." This is of the very essence of the crime of larceny, (m) as it has been already shewn to be essential in one of a similar nature, namely, in robbery. (n)

This material ingredient in the offence of larceny underwent great consideration in a modern case, where the following circumstances were given in evidence against the prisoners, upon an indictment for a burglary and larceny. It appeared that the prisoners, intending to rob a manufactory at Soho, near Birmingham, of which Mr. Boulton was the principal proprietor, applied to a man named Phillips, who was employed as servant and watchman to the manufactory, to assist them in the robbery. Phillips assented to their proposal; but immediately afterwards gave information to Mr. Boulton, and told him what was intended, and the manner and time the prisoners were to come:—that they were to go into the counting-house, and that he was to open the door into the front yard for them. Mr. Boulton told him to carry on the business, and that he would bear him harmless; and Mr. Boulton also consented to his opening the door leading to the front yard, and to his being with the prisoners the whole time. In consequence of this information, Mr. Boulton removed from the counting-house every thing but 150 guineas, and some silver ingots, which he marked, in order to furnish evidence against the prisoners; and laid in wait to take them, when they should have accomplished their purpose. On the 23d of December, about one o'clock in the morning, the prisoners came, and Phillips opened the door into the front yard, through which they went along the front of the building, and round into another yard behind it, called the middle yard; and from thence they and Phillips went through a door, which was left open, up a staircase in the centre building, leading to the counting-house and rooms where the plated business was carried on: this door the prisoners bolted, and then broke open the counting-house, which was locked, and the desks, which were also locked; and took from thence the ingots of silver and guineas. They then went to the story above, into a room where the plated business was carried on, and broke the door open; and took from thence a quantity of silver, and returned down stairs; when one of them unbolted the door at the bottom of the stairs which had been bolted on their going in, and went into the middle yard, where all (except one who escaped), were taken by the persons placed to watch them. On this case

The taking of the goods must be "*invito domino*."

Eggington's case. Some thieves having planned with the servant of the owner to steal some goods, the owner, knowing of the plot, directed his servant to carry on the business, with a view to the detection of the thieves, which the servant accordingly did; and it was holden to be larceny by the majority of the Judges: but one of them doubted, on the ground of the owner's assent and partial encouragement to the felony by means of his servant.

(l) *Rex v. Donally and Vaughan*, Mich. T. 1816. Russ. & Ry. 310. S. C. 2 Marsh. Rep. 571. From this decision it became unnecessary to give any opinion upon the objection

taken on behalf of the prisoner Vaughan.

(m) *Fost.* 123.

(n) *Ante*, 66.

two points were made for the prisoners; one, which has been noticed in a former chapter, that the offence did not amount to burglary, and which was decided in favour of the prisoners; (o) the other that no felony was proved, as the whole was done with the knowledge and assent of Mr. Boulton, and that the acts of Phillips were his acts. The prisoners having been convicted, the case was argued before the twelve Judges, a majority of whom held that the prisoners were guilty of the larceny; for that, although Mr. Boulton had permitted, or suffered, the meditated offence to be committed, he had not done any thing originally to induce it; that, his object being to detect the prisoners, he only gave them a greater facility to commit the larceny than they otherwise might have had: and that this could no more be considered as an assent than if a man, knowing of the intent of thieves to break into his house, were not to secure it with the usual number of bolts. They thought also that there was no distinguishing between the degrees of facility a thief might have given to him; that Mr. Boulton never meant that the prisoners should take away his property, and the circumstance of the design originating with the prisoners, and Mr. Boulton's taking no step to facilitate or induce the offence, until after it had been thought of, and resolved on by them, formed, in the opinion of some of the Judges, a very considerable ingredient in the case, and differed it greatly from what it might have been, if he had employed his servant to suggest the perpetration of the offence originally to the prisoners. But Lawrence, J., before whom the prisoners were tried, doubted whether it could be said to be done "*invito domino*," when the owner had directed his servant to carry on the business, and meant that the prisoners should be encouraged by the presence of that servant; and that by his assistance they should take the goods, so as to make a complete felony; though he did not mean that they should carry them away. (p)

Cases where the taking is by the delivery, or consent of the owner, or of some person having authority to deliver the goods.

Upon some of the doctrines relating to the felonious *taking* &c. which have been already mentioned, points of considerable difficulty will sometimes occur: but by far the most nice and intricate questions arise upon the class of cases which are now to be considered, namely, those in which it appears that the goods were taken *by the delivery or consent of the owner, or of some one having authority to deliver them*. The material ingredients in the definition of larceny, already spoken of, must still be kept in mind; particularly that of the *animus furandi*, and the doctrine that the goods must be taken "*invito domino*."

Delivery, where there is no change of property, or of legal possession.

It may, in the first place, be observed, with respect to these cases where the goods are obtained by delivery, that if it appear that, although there is a delivery by the owner in fact, yet there is clearly *no change of property nor of legal possession*, but the legal possession still remains exclusively in the owner, larceny may be committed exactly as if no such delivery had been made.

Cases where there is a bare charge, or

Thus, if a person, to whom goods are delivered, has only the bare charge, or custody, of them, and the legal possession re-

(o) *Ante*, Chap. on *Breaking, &c.* 2 Leach 913. 2 East. P. C. c. 16. s. within the *Curtilage*, p. 57. 58. 101. p. 666.

(p) *Rex v. Eggington and others*,

mains in the owner, such person may commit larceny, by a fraudulent conversion of the goods to his own use. (r) A doctrine which directly applies to the case of servants entrusted with the care of goods in the possession of their masters, as will be shewn more fully, when larcenies by servants are treated of in a subsequent chapter. And larceny may be committed also in a like manner by a person who has a bare special use of goods. Thus, a man may be guilty of larceny in taking a piece of plate, set before him to drink in a tavern; for he has only a liberty to use, not a possession by delivery. (s) So if a weaver, or silk-throwster, deliver yarn, or silk, to be wrought by journeymen, in his house, and they carry it away with intent to steal it, this is felony; the entire property remaining there in the owner, and the possession of the workmen being the possession of the owner. (t) But it would not be felony if the yarn had been delivered to a weaver out of the house, who, having thus the lawful possession of it, had afterwards embezzled it; because by the delivery he had a special property, and not a bare charge; in the same manner as one who is entrusted with the care of a thing for another to keep for his use. (u)

custody, or a special use only of the goods.

It is stated that, in general, where the delivery of goods is made for a certain special and particular purpose, the possession is still supposed to reside, unparted with, in the first proprietor. (x) And that if a watchmaker steal a watch, delivered to him to clean; or if a person steal clothes, delivered for the purpose of being washed; or goods in a chest, delivered, with the key, for safe custody; or guineas, delivered for the purpose of being changed into half-guineas; or a watch, delivered for the purpose of being pawned; in all these instances the goods taken have been thought to remain in the possession of the proprietor, and the taking of them away held to be felony. (y) But, unless in these cases the privity of contract, under which the goods were delivered, appeared, by some means, to have been determined (of which more will be said hereafter), it seems difficult to see how they are distinguishable, some of them at least, from the cases of a goldsmith, to whom plate is delivered to work or to weigh; a tailor, to whom cloth is delivered that he may make clothes with it; and a friend, who is entrusted with property to keep for the owner's use; in which cases an embezzlement, or conversion of the goods, by the party to whom they are delivered, has been said not to amount to felony. (z) In these latter cases, as well as in the former, the delivery of the goods is made only for a special purpose; yet it seems that the possession of them has not been considered as remaining with the owner, but as having passed to the party by a lawful delivery without fraud, and, therefore, not the subject of a subsequent felonious conversion. The distinc-

(r) 1 Hale 505, 506. 1 Hawk. P. C. c. 33. s. 6. 2 East. P. C. c. 16. s. 109. p. 682.

(s) 1 Hale 506.

(t) Anon. Old Bailey, 1664. Kel. 35. 2 East. P. C. c. 16. s. 109. p. 682.

(u) 2 East. P. C. c. 16. s. 109. p. 682, 683. 1 Hawk. P. C. c. 33. s. 2.

(x) 1 Hawk. P. C. c. 33. s. 9.

(y) 1 Hawk. P. C. c. 33. s. 10. and the various cases there cited.

(z) 1 Hawk. P. C. c. 33. s. 2. 2 East. P. C. c. 16. s. 113. p. 692.

tion, indeed, between a bare charge, or special use of goods, and a general bailment of them, seems to be sufficiently intelligible; and it seems consistent with principle that, in the former case, the legal possession should be considered as remaining in the owner; and, in the latter, as having passed to the bailee; and that, therefore, in the former case larceny may be committed of them by the person to whom they have been delivered, and that in the latter it may not, unless there be a determination of the privity of contract: but it is in the application of this doctrine to particular cases, that the distinctions seem to become obscure. (a)

Campbell's case. A landlady sends her servant to a lodger with a bank-note, requesting him to change it, and he goes away with it. Held to be larceny.

In a case where the prisoner was a lodger, and his landlady, wanting change for a bank-note, sent it, by her servant, to the prisoner up stairs, begging that he would give her change for it; when the prisoner, after examining his purse, said that he had not gold enough about him for the purpose, but that he would go immediately to his bankers, and get the note changed; upon which he left the house, with the bank-note in his hand, and never returned; the prisoner appears to have been convicted without any question having been made as to the offence amounting to larceny. (b) But, in this case it probably might have been considered that the landlady did not intend to part with the note without first receiving the change; and if so, that the servant delivered the note to the prisoner without the authority of her mistress, and, therefore, that no legal possession of it ever passed to the prisoner; and that in taking it he was guilty of a trespass. (c)

Delivery, where the owner remains present.

It has been suggested as worthy of consideration whether the distinction concerning the legal possession remaining in the owner, after a delivery in fact to another, do not extend to all cases where the thing, so delivered for a special purpose, is intended to remain in the presence of the owner. And it is well advanced, in support of the observation, that in cases of this kind the owner cannot be said to give any credit to, or repose confidence in, the party in whose hands it is so, in fact, placed; and that, the thing being intended to be returned to the owner again, and resumable by him every moment, his dominion over it is as perfect as before; and the person, to whom it is so delivered, has, at most, no more than a bare limited use, or charge, and not the legal possession of it. (d) And though the case of a person going into a shop, under pretence of buying goods, and, upon their being delivered to him to look at, running away with them; and also that of a person going into a market, and obtaining a horse for the purpose of trying its paces, and then riding away with it, have

(a) See more upon the cases which relate to a delivery and privity of contract determined in a subsequent part of this chapter. And upon those which relate to a bare charge of the goods or a possession of them delivered over, *post*, sect. 3. in which the special property sufficient to constitute an ownership of the goods taken is considered; and also *post*, Chap. On Larceny by Ser-

vants.

(b) Campbell's case. 2 Leach 564. There was a question raised in the case as to the offence amounting to a stealing in the dwelling-house (within the statute 12 Ann. c. 7.), which was noticed *ante*, p. 52, 53.

(c) By Scarlett, *arguendo*, in Walsh's case. 2 Leach 1079.

(d) 2 East. P. C. c. 16. s. 110. p. 683.

been considered as felonies, on the ground of a præconcerted design to steal the chattels; (e) yet they appear also to be sustainable on the ground that the legal possession of such chattels still remained in the owner of the goods, notwithstanding the delivery, *he continuing present.* (f)

Upon the same principle also, of there being but a bare charge or special use, it has been holden that if the clerk to a banker or merchant have the care of money, or if he have access to it for special and particular purposes, and be sent to the bag or drawer for money, for the purpose of paying a bill, or if he be sent for the purpose of bringing money generally out of the bag or drawer, and, at the time he brings such money, he clandestinely and secretly takes out other money for his own use, he is as much guilty of a felony, as if he had no care of the money, or access whatsoever to the bag or drawer. (g)

It may further be observed, as clearing the ground of enquiry concerning these cases of a delivery of the goods by the owner, that it is a settled and well established principle, that if the owner part with the *property* in the goods taken, there can be no felony in the taking, however fraudulent the means by which such delivery was procured. (h)

The following are some of the cases in which it has been holden that the owner had parted with the *property* in the goods, by his delivery of them to the prisoner.

Upon an indictment for horse-stealing it appeared that the prosecutor was at a fair, having a horse there, in the care of a servant, which he intended to sell, when he was met by the prisoner, to whom he was personally known, and who said to him, "I hear you have a horse to sell; I think he will suit my purpose; and if you will let me have him a bargain I will buy him." The prisoner and the prosecutor then walked together into the fair, towards the horse, and, upon a view of him, the prosecutor said to the prisoner, "You shall have the horse for eight pounds;" and calling to his servant, he ordered him to deliver the horse to the prisoner. The prisoner immediately mounted the horse, saying to the prosecutor, that he would return immediately and pay him. The prosecutor replied, "Very well." The prisoner rode away with the horse, and never returned. Upon these facts, the learned Judge, by whom the prisoner was tried, directed an acquittal; on the ground that there was a complete contract of sale and delivery, and that the *property*, as well as the possession, was entirely parted with. (i)

Delivery, where the owner parts with the *property* in the goods taken.

Harvey's case. The prisoner rode away with a horse from a fair, after it was sold to him, without paying the purchase-money.

(e) 1 Hawk. P. C. c. 33. s. 14, 15. Kel. 82. 2 East. P. C. c. 16. s. 106. p. 677.

(f) Chisser's case, T. Raym. 275, 276. 2 East. P. C. c. 16. s. 110. p. 683, 684: in which last-cited authority see also the argument in support of this doctrine.

(g) Murray's case, O. B. 1784. 1

Hawk. P. C. c. 33. s. 7. 2 East. P. C. c. 16. s. 109. p. 683. 1 Leach 344.

(h) 2 East. P. C. c. 16. s. 102. p. 668. s. 103. p. 669. s. 113. p. 693.

(i) Harvey's case, *Chelmsford Sum. Ass.* 1787, *cor.* Gould, J. 1 Leach 467. 2 East. P. C. c. 16. s. 103. p. 669.

Parkes's case. The prisoner, with a fraudulent intent to obtain goods, ordered a tradesman to send him some, to be paid for on delivery; and, upon the goods being sent accordingly, gave the servant, who brought them, bills, which were mere fabrications, and of no value: and it was helden not to be larceny, on the ground that the servant parted with the property by accepting such payment as was offered, though his master did not intend to give the prisoner credit.

In another case, the indictment against the prisoner was for stealing a piece of silk of the value of ten pounds, the goods of Thomas Wilson. Mr. Wilson was a silk manufacturer, in the neighbourhood of *Cheapside*; and it was proved that the prisoner had called at his warehouse, and, after looking at several pieces of silk, had selected the one in question, agreed for the price of it; and said that his name was John Williams, that he lived at No. 6, Arabella-row, in Pimlico, and that if Mr. Wilson would send it there at six o'clock in the afternoon, with a bill and receipt, he would pay him for it. Mr. Wilson, accordingly, entered the piece of silk in his day-book, to the debit of the prisoner, made out a bill of parcels for it in his name, and sent his shopman with it to the place, and at the hour appointed. The shopman met the prisoner near Arabella-row, and accompanied him to No. 6, where he went with him into a room, and delivered to him the bill of parcels, which he examined; and after saying it was right, gave the shopman two bills of 10*l.* each, drawn by Frith and Co. at Bradford, on Taylor and Co. in London. The amount of the silk was only 12*l.* 10*s.*; and the shopman stated that he had not sufficient cash about him to pay the difference between that sum and the amount of the two bills; upon which the prisoner said that it was immaterial, that he should want more goods, and that he would call on the ensuing day at his master's, to look out other goods, and take the change. Upon this the shopman left the goods, and returned home with the bills. The prisoner never came again to Mr. Wilson's warehouse; the bills, upon being presented at Taylor and Co.'s, turned out to be mere fabrications; and, on enquiry at No. 6, Arabella-row, it appeared that the prisoner had only bargained for the lodgings the same morning, and that he absconded with the goods in a few minutes after Mr. Wilson's shopman had left the house. It was also proved that, within a month after the goods had been so obtained by the prisoner, the entry that had been made in the day-book was copied into the journal, and from thence posted regularly into the ledger, in the usual way where goods were not paid for immediately; and that the prisoner still stood debited in the ledger for the amount. It was objected, upon these facts, by the counsel for the prisoner, that there was a sale of the goods to him, and such a delivery as would *change the property*. Upon which the learned Judge, by whom the prisoner was tried, left it to the jury to consider whether there was not, in the mind of the prisoner, at the very beginning of this transaction, an intention and premeditated plan to obtain the goods without paying for them; and also whether this was a sale by Mr. Wilson, and a delivery of the goods, with intent to part with the *property*, he having received bad bills in payment for them; through the medium of his shopman. The jury were of opinion that the prisoner, from first to last, intended to defraud Mr. Wilson; and that it was not Mr. Wilson's intention to give him credit: and they found him guilty. But the case being afterwards submitted to the consideration of the Judges, they were of opinion that the conviction was *wrong*; for that Mr. Wilson had *parted with the property* as well as the possession, upon receiving

that which was accepted by his servant as payment, although the bills turned out afterwards to be of no value. (k)

Upon an indictment against three persons, named Nicholson, Jones, and Chappel, for stealing a bank post bill of twenty pounds, another of fifteen pounds, and also seven guineas, the property of William Cartwright, the following were the material facts given in evidence. Nicholson introduced himself to the prosecutor, who was a pensioner in the Charter-house, by coming to his apartments at that place, and pretending to enquire as to the rules of the charity. He had not before that time any sort of acquaintance with the prosecutor, but he succeeded in getting him to enter into conversation, and to produce the rules of the charity from his desk, which gave Nicholson an opportunity of seeing that the prosecutor had some money. Nicholson then proposed to the prosecutor that they should take a walk together, which they did, and went to a public-house, where they were joined by the prisoner Chappel. Some liquor was called for, when the other prisoner, Jones, came into the room, and said that he had just come from Coventry, for the purpose of receiving a large legacy, and produced a quantity of papers, like bank-notes; upon which Chappel said to him, "Aye, I see it is good, but I imagine you think nobody, in company, has got any money but yourself;" to which Jones answered, "I will lay ten pounds, that neither of you shew forty pounds in three hours." Immediately on this bet being proposed, the parties left the room; and Nicholson and Chappel both asked the prosecutor if he could shew forty pounds, to which he answered, that he believed he could. Nicholson then accompanied the prosecutor to his room, at the Charter-house, where the prosecutor took out of his desk the two post bills in question, and five guineas, and afterwards took out two more guineas, upon Nicholson advising him to take a guinea on two more: and they then went together to another public-house, called The Spotted Horse, where Chappel had previously said, on their leaving the first public-house, that he should go; and where they found both Jones and Chappel in a back room. Jones put down a paper, apparently a 10*l.* note, for each who could shew forty pounds, upon which the prosecutor shewed his forty pounds, in the post bills and guineas, by laying them down on the table, but did not recollect whether he took up the 10*l.* paper, which was given to him upon his being allowed to have won his wager. The prisoner, Jones, then proceeded to write four letters with chalk on the table; after which he went to the end of the room, turned his back, and said that he would bet them a guinea each that he would name another letter which should be made, and a basin put over it. Another letter was, accordingly, made, and covered with a basin. Jones named a letter, but not the right one; by which the others won a guinea each. Nicholson and Chappel then said, "He is sure to lose; we may as well make it more, as we are sure to win: we may as well ease him of his money; he has more than he knows what to do with."

Nicholson's case. The prosecutor having been inveigled by sharpers to bet with them, and suffered by them to win in the first instance, was afterwards stripped of a large sum by losing a bet; and the whole transaction was found by the jury to have been a preconcerted scheme to get the prosecutor's money: but it was holden not to be a felonious taking, as the prosecutor parted with the property in his money, under an idea that it had been fairly won.

(k) *Parker's case*, O. B. 1794. *cor. Macdonald*, C. B. 2 *Leach* 614. 2 *East. P. C. c.* 16. s. 108. p. 271.

The prosecutor was so worked up with the hope of gain, that he at length, after various sums being proposed, staked his two post-bills and the seven guineas; after which Jones named a letter, and guessed right; and then went to the table, swept off the bills and money, and went to the door of the room; the other prisoners sitting still, and the prosecutor making no objection, conceiving that he had fairly lost the money to Jones. It happened that just at this time some police officers came to the house, who, upon seeing Jones, ran hastily towards the door, seized him, and brought him back into the room; and, upon perceiving, from the chalks upon the table, what had been going on, took the whole party into custody. Upon searching the prisoners, about eight guineas in cash were found upon them, and a great number of flash notes, but no real ones: and it was afterwards found that a lump of paper, which was put into the prosecutor's hands by Jones when the officers came in, contained the two post bills belonging to the prosecutor.

The prosecutor said, upon his cross-examination, that he did not know whether the paper which was given to him by Jones, on his shewing forty pounds, was a real ten pound note or not; that he intended to gamble; that, having won the first wager, he should, if the transaction had ended there, have kept the guinea; that he did not object to Jones taking his forty-two pounds seven shillings which he lost; and that, if Jones had guessed wrong the second time, he expected to receive from him forty-two pounds seven shillings, the amount of the stake. Upon this evidence it was contended, on behalf of the prisoners, that this was a mere gaming transaction, or, at most, only a cheat, and not a felony: and the court left it to the jury to consider, whether this were a gaming transaction, or whether it were a pre-concerted scheme by the prisoners, or any of them, to get from the prosecutor the post bills and cash. The jury were of opinion, that it was a preconcerted scheme in all the prisoners to get from the prosecutor his post bills and cash; and they found them guilty. But, upon the case being submitted to the consideration of the twelve Judges, they all of them held the conviction wrong; on the ground that in this case *the property* in the post bills and cash was parted with by the prosecutor, under the idea that it had been fairly won. (l)

Coleman's case.

The same rule will prevail though the name of another person be used to procure a delivery by the owner. So that where silver was so

It appears from another case not to make any difference, where the credit may have been obtained by fraudulently using the name of another person, to whom in fact the credit was intended to be given, if the delivery of the goods were made by the owner or any other having the disposing power for that purpose. Thus, where the prisoner went to a tradesman's house, and said she came from a Mrs. Cook, a neighbour, who would be much obliged if he would let her have half a guinea's worth of silver, and that she would send the half guinea presently, and thereby obtained the silver, it was holden not to be a felony. (m) And it has been observed

(l) *Rex v. Nicholson, Jones, and Chappel, cor. Macdonald, C. B., Old Bailey, 1794, 2 Leach 610. 2 East. P. C. c. 16. s. 103. p. 669.* The result would have been different if the pos-

session only had been parted with, Robson's case, *post.* 123.

(m) *Rex v. Coleman, O. B. 1785, 2 East. P. C. c. 16. s. 104. p. 672. 1 Leach 302, note (a).*

with respect to this case, that in truth it was a *loan* of the silver, upon the faith that the amount would be repaid at another time; that it was money obtained on a false pretence; and that the same determination had been made in similar cases at the Old Bailey. (n)

The prisoner, Phineas Adams, was indicted for stealing a hat, which was stated in one count to be the property of Robert Beer, and in another of John Paul. The substance of the evidence was, that the prisoner bought a hat of Robert Beer, a hat-maker, at Ilminster; that soon afterwards he called for it, when he was told it would be got ready for him in half an hour, but that he could not have it without paying for it. While he was in the shop, Beer shewed him a hat which he had made for one John Paul, upon which the prisoner said, that he lived next door to him; and he then asked when Paul was to come for his hat, and was told he was to come that afternoon in half an hour or an hour. The prisoner then went away, saying, he would send his brother's wife for his own hat. Soon after he went away, he met a boy, whom (though he did not know him) he asked if he was going to Ilminster; and, upon the boy saying that he was going thither, he asked him if he knew Robert Beer, and said that John Paul had sent him to Beer's for his hat, but that as he owed Beer for a hat himself, which he had not money to pay for, he did not like to go. And he then asked the boy (to whom he had promised something for his trouble) to take the message from Paul, and bring Paul's hat to him (the prisoner). He further told the boy not to go into Beer's shop, in case Paul (whom he described by his person and a peculiarity of dress) should happen to be there. The prisoner then accompanied the boy part of the way, after which the boy proceeded alone to Beer's, delivered his message, and received the hat; which, after carrying it part of the way for the prisoner, by his desire, the prisoner received from him, and said he would take it himself to Paul. Upon the fraud being discovered shortly afterwards, the prisoner was apprehended with the hat in his possession. It was objected, on the part of the prisoner, that these facts did not establish a case of larceny: and that the indictment should have been upon the statute for obtaining goods by false pretences. And the jury having found the prisoner guilty, the question was reserved for the opinion of the Judges, who decided that the offence did not amount to a felony; the owner having parted with his property in the hat. (o)

In a case of recent occurrence, by which a great deal of interest was excited, the prisoner was charged in the first count of the indictment with stealing twenty-two bank-notes, of the value of a thousand pounds each, and one bank-note of the value of two hundred pounds, the property of Sir Thomas Plumer; and, in several additional counts, with stealing a written instrument, which, in some of them, was called "a bill of exchange" for the payment

obtained, it was holden not to be felony.

Adams's case. Where a hat was obtained under false pretences, by which the owner was induced to part with the property.

Walsh's case. Held under the particular circumstances that as there was no fraud used to induce the prosecutor to deliver a check, there

(n) 2 East. P. C. c. 16. s. 104. p. 673.

(o) Adams's case, *cor.* Chambre, J., *Taunton Spr. Ass.* 1812, MS. And

it seems that the Judges thought the second count out of the question, as Paul never had possession of the hat.

was no larceny of the check, although the prisoner intended to misapply the proceeds before he received the check, and did misapply them accordingly. And as to a charge of stealing the notes which were the proceeds of the check, held under the particular circumstances that the property in the notes never was vested in the prosecutor.

of 22,200*l.*, and in others, "a warrant for payment of money." The following facts were proved in support of the charge. The prosecutor, Sir Thomas Plumer, having contracted, in July, 1811, for the purchase of a large estate, shortly afterwards consulted the prisoner, who was a stock-broker of eminence, and who had long been employed in that capacity by the prosecutor, as to the most advantageous time to sell out stock, so as to be prepared with the purchase-money about the ensuing Michaelmas. The price of stock was then very low, and the prisoner advised that the sale might be delayed as long as possible, which recommendation was adopted by the prosecutor, who requested the prisoner to apprise him from time to time of the variations that might occur in the state of the market. The prosecutor was not called upon to prepare the purchase-money by the time which was first mentioned, as the title to the estate was not then completed; but in the month of October, having reason to believe that the deeds would be ready on or before the ensuing Christmas-day, he communicated that circumstance to the prisoner, and consulted him as to the expediency of disposing of the stock immediately, or letting it remain until the money should be wanted; when the prisoner again advised him to delay the sale. On the 25th of November, the prisoner stated to the prosecutor that he then apprehended a fall in the price of stock, and apprized him that the transfer-books at the Bank would shut on the 3d December; and soon afterwards he became extremely urgent with the prosecutor to dispose of his stock immediately, writing to him, and frequently calling upon him for the purpose of giving such advice, and stating, as the reason for his importunity, a probable fall in the price of stock. The prosecutor was influenced by these representations, and also by the concurrent opinion of a commercial gentleman whom he consulted on the subject; and, on Thursday, the 28th November, gave the prisoner a power to sell out a quantity of stock, which, on the ensuing morning, he contracted to sell for the sum of 21,700*l.* The prosecutor went on the next morning into the city, with the intention of finishing the business; but the prisoner stated that some previous notice must be given to the purchaser to be ready with the money, in consequence of which the prosecutor appointed Wednesday, the 4th December, for making the transfer. On that day the prosecutor attended and transferred the stock, and expressly ordered the prisoner immediately to invest the proceeds in Exchequer bills, and lodge them on his account at his bankers, Messrs. Goslings and Co. in Fleet-street; but the prisoner told him that it was then too late to procure Exchequer bills to such an amount; which the prosecutor supposed to be true (though in fact it was not), and therefore left him to receive the 21,700*l.* of the purchaser, desiring that he would pay it into his banker's the same day, which he promised to do, saying at the same time, that he would call on the prosecutor the next morning, and get his check for such sum as he might choose to have laid out in Exchequer bills. The prisoner accordingly received the 21,700*l.*, paid it into his own bankers, Robarts and Co.'s; and on the same day paid into Gosling and Co.'s his own check on Robarts and Co. for 21,500*l.* on the prosecutor's account. On the

following morning, Thursday, the 5th December, he called on the prosecutor, and received from him *a check*, (the instrument mentioned in the indictment) on Gosling and Co.'s, for 22,200*l.* The prosecutor directed him to go to Gosling's and get the money for it, telling him that it was for the precise and express purpose, and for no other purpose whatever, of laying it out in Exchequer bills; which the prisoner positively promised he would do, and either pay the bills into Gosling and Co.'s, or bring them to the prosecutor by four o'clock on the same day. Nothing was said as to what was to be done with the money in case Exchequer bills could not be purchased. The prisoner then went to Gosling and Co.'s with the check, and there received for it 22,200*l.* in twenty-two bank-notes of 1,000*l.* each, and one bank-note of 200*l.*; and on the same day he purchased with part of that money 6,500*l.* Exchequer bills, which he lodged at Gosling and Co.'s on the prosecutor's account, and took a receipt for them. At about half-past four o'clock on the same day, the prisoner called on the prosecutor, and produced the receipt for the Exchequer bills, and stated that he had paid the remainder of the money into Gosling and Co.'s, as he had contracted with Coutts and Co. for Exchequer bills to the amount of 15,000*l.*, but that one of the partners of the house of Coutts and Co. was at that time absent from London, had the bills locked up in a drawer, and would not return to deliver them until the following Saturday, the 7th December, on which day the prisoner said, he would call again for the prosecutor's check for that amount, and lodge the Exchequer bills for which he had so contracted at Gosling and Co.'s on the prosecutor's account. The prosecutor did not examine the papers delivered to him by the prisoner, during the time the prisoner was with him; but, upon looking at them after he was gone away, he was surprised to find that there was only a receipt for the Exchequer bills, and no receipt for the residue of the money. This circumstance caused suspicion, and an enquiry was almost immediately made, when it was ascertained that the prisoner had, on the afternoon of that same day, set out for Falmouth in the mail coach, in which he had previously secured a place in a fictitious name; and that he had left a note, addressed to the prosecutor, with his clerk, dated on Saturday, the 7th December, and stating that the business respecting Coutts' Exchequer bills could not be finished until the following Monday. This note he had desired might not be delivered till the Saturday. It appeared also that, for some time before he absconded, the prisoner had been labouring under great pecuniary embarrassments, and had meditated an emigration to America; and that about the 29th of November he had applied to an American broker to procure for him American stock to the amount of 11,000*l.*, and stock nearly to that amount was accordingly bought for him, and paid for by him, on the Thursday, the 5th of December, with eleven of the same bank-notes of 1,000*l.* each, which he had received for the prosecutor's check: and it further appeared, that several others of the 1,000*l.* notes so received for the prosecutor's check, had been paid away by him to different persons on his own account. It was proved also, that on the same day, Thursday, the 5th December, he paid

to a dealer in foreign coin, 300*l.* for doubloons, which he had contracted for three days before, and which were delivered to him on that day. And further, that he left his country-house at Hackney early on the same morning, in a stage coach, and brought with him a travelling portmanteau of linen and a drab great coat, which he had contrived to pack up without the knowledge of his family ; that he provided himself with some stockings, night-caps, and gloves, at a hosier's in Threadneedle-street, to whom he said that he was going out of town for a few days ; and that, after having procured the foreign coin and American securities, he absconded by means of the Falmouth mail. When the route which he had taken was discovered, he was speedily pursued and apprehended at Falmouth, as he was about to get on board a packet for Lisbon, to which place he acknowledged that he intended to go in the first instance, and afterwards take an opportunity of getting to America. On being told the charge made against him, he delivered up the 11,000*l.* American bank shares, and the bag of doubloons.

The question left to the jury was, whether the prisoner, before he received the check, had formed the design of converting the money which should be received by means of it to his own use, or whether that design arose in his mind after he was in possession of it. They were directed to find the prisoner guilty, if they were of opinion that the former was the fact. The jury were of that opinion, and returned a verdict of guilty. Judgment was then respited, and the case reserved in order that the opinion of the Judges might be taken upon several objections made by the prisoner's counsel.

As to the counts which charged the stealing of a bill of exchange or warrant (*i. e.* the check) it was objected that the check was one entire thing, and could not be said to be stolen, as part of the produce, *viz.* 6,500*l.* was applied to the prosecutor's use, therefore there could not be a taking of the check with a felonious intent.

As to the same counts, it was also objected that under the 2 Geo. 2. c. 25, it was necessary that the instrument stolen should be of value in the hands of the party from whom it was stolen ; that the check was of no value to the prosecutor in his own hands ; but that if it had been lost by the prosecutor, and got into the hands of a third person, and had been stolen from that third person, it would be within the act, as being then an instrument of value in that third person's hands, otherwise not.

It was also objected that the prosecutor had parted in this case with both the property and possession of the bill of exchange or warrant, and without fraud or misrepresentation ; and this case was said to be the same as that of a voluntary deposit of money with a banker, who had previously determined to apply it to his own use.

That the identical notes paid to the prisoner were notes on which the prosecutor had no specific claim, and never were vested in him.

That bank-notes were not expected in return for the check, but another and a different thing, *viz.* Exchequer bills.

And that if the prosecutor had delivered the twenty-three notes

themselves to the prisoner, he undertaking to buy Exchequer bills with them, it would have been only a breach of contract, which he was to fulfil by returning Exchequer bills, and that he was to be considered as debtor to the prosecutor for the deficiency.

In Hilary Term, 1st of February, 1812, this case was argued in the Exchequer Chamber before all the Judges (except Lawrence, J.,) by Scarlett for the prisoner, and Gurney for the crown. And again on the 14th of February, 1812, before all the Judges (except Lawrence, J., and Chambre, J.,) when all the Judges present were of opinion that it was not a felony, and that the conviction was wrong upon several grounds. First, because there was no fraud or contrivance to induce Sir Thomas Plumer to give the check; secondly, because the check could not be called his goods and chattels, and was of no value in his hands; thirdly, because he had never had possession of the notes received at the bankers, so that they could not be called his notes; and fourthly, because the bankers were discharged of the money by paying it on the check, so that they were not defrauded, and it could not be said the money was stolen from them. (*p*)

The principle that cases of this description, where the property in fact passes by the delivery of the owner, will fall within the same rule, though the credit may have been obtained by fraudulently using the name of another person, (*q*) was further acted upon in the following case. The prisoner was indicted for stealing two bank-notes, the property of William Dunn. The facts were, that the prisoner employed one Dale, to whom he was previously unknown, to carry a letter to the prosecutor, and told him to say to the prosecutor that he had brought the letter from Mr. Broad. He also told Dale to bring the answer to him in the next street, where he would wait for him. Dale carried the letter to the prosecutor, to whom it was directed. It was written in the name of a Mr. Broad, who was a friend of the prosecutor's, solicited the loan of three pounds for a few days, and desired that the money might be enclosed back in the letter immediately. The prosecutor, upon the receipt of this letter, sent the bank-notes in question, enclosed in a letter directed to Broad, which he delivered to Dale, who delivered it to the prisoner as he was first ordered. The letter sent by the prisoner to the prosecutor was altogether an imposition. It was objected on behalf of the prisoner at the trial that this was no felony, because the absolute dominion of the property was parted with by the owner, though induced thereto by means of a false and fraudulent pretence. And the prisoner having been convicted, the case was submitted to the consideration of the Judges, who (with the exception of Buller, J., who was absent) held that it was no felony, as it appeared *that the property was intended to pass by the delivery of the owner.* (*r*)

Atkinson's case.

The prisoner wrote a letter in the name of another, to a third person, requesting a loan of money, and obtained the money by such means: held that the property in the money passed by the delivery of the owner, and therefore that the offence did not amount to felony.

(*p*) Walsh's case, Hil. T. 1812. Russ. & Ry. 215. 2 Leach 1054, 1062. 4 Taunt. 258, 264.

(*q*) *Ante*, 112.

(*r*) *Rex v. James and William Atkinson, cor. Le Blanc, J., O. B. 1799,*

and Mich. T. 1799. 2 East. P. C. c. 16. s. 104. p. 673., where it is also said that the Judges considered this case as within the statute 33 Hen. 8. c. 1. against false tokens; which particularly speaks of counterfeit letters.

Delivery,
where the
owner does
not part with
the property,
but only with
the possession,
of the goods.

The cases which have been thus cited abundantly establish the proposition first laid down, that where the *property* in the goods taken has been *parted with* by the owner, there can be no larceny.

But if the owner has not parted with the *property* in the goods, but only with the *possession* of them, the question of larceny still remains open; and will depend upon the fact, whether, at the time of the alleged felonious taking, the owner had parted with the possession of the goods in such a manner, and to such an extent, as to exclude the idea of trespass. For if the owner of the goods parted with the possession of them without fraud practised by the taker, and if, after the owner had so parted with the possession of them, nothing was done to determine the privity of contract under which the taker had the possession of them delivered to him, no trespass, and therefore no larceny, can be committed by their conversion.

Upon the subject therefore of larceny, where the owner or person authorized to dispose of the goods has parted with the *possession* of them by delivery to the party accused, the enquiry seems to resolve itself into two heads; first, Whether the delivery were obtained fraudulently with intent to steal the goods; and if the delivery were not so obtained, then, secondly, Whether the lawful possession has been determined, and whether there has been any new and felonious taking.

Delivery,
where it has
been obtained
fraudulently,
with intent to
steal the goods.

I. The cases in which it has appeared that the delivery of the goods was obtained fraudulently, and with intent to steal them, consist principally of transactions usually described by the term *swindling*, and which have been in most instances carried on by the common arts adopted on such occasions. In a few, however, the more aggravated proceeding has been adopted of getting fraudulent possession of the goods by act of law.

Sharpless and
Greatrix's
case.
A hosier by
the desire of
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of silk stock-
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en to be lar-
ceny.

The prisoners Samuel Greatrix and John Sharpless were convicted of larceny, in stealing six pair of silk stockings, the property of Owen Hudson: but, a doubt arising as to the propriety of the conviction, the judgment was respited, and the question referred to the consideration of the Judges on the following case. Greatrix, in the character of servant to Sharpless, left a note at the shop of Mr. Hudson, who was a hosier in Bridge-street, Westminster, desiring that he would send an assortment of silk stockings to his master's lodgings at the Red-lamp in Queen-square. Mr. Hudson in consequence took a variety of silk stockings according to the direction. Greatrix opened the door to him, and introduced him into a parlour, where Sharpless was sitting in a dressing-gown, his hair just dressed, and an unusual quantity of powder all over his face. Mr. Hudson unfolded his wares, and Sharpless looked out six pair of silk stockings, the price of which Mr. Hudson told him was fourteen shillings a pair; and he then desired Mr. Hudson to fetch some silk pieces for breeches, and some black silk stockings with French clocks. Mr. Hudson hung the six pair of stockings which Sharpless had looked out, on the back of a chair, and went home for the other goods; but no positive agreement had taken place respecting the stockings. During Mr. Hudson's absence, Sharpless and Greatrix decamped with the

six pair of stockings, which were proved to have been afterwards pawned by Sharpless.

The Judges were of opinion, that the conviction was right ; for the whole of the prisoners' conduct manifested an original and preconcerted design to obtain a tortious possession of the property ; and the verdict of the jury imported, that in their belief the evil intention preceded the leaving of the goods. The Judges thought also that, even independently of the preconcerted design and evil intention, there did not appear to be a sufficient delivery to change the possession of the property. (s)

The prisoner, John Wilkins, was indicted for stealing a great many pair of stockings, the property of William Wayte. The following were the facts of the case. The prosecutor, Mr. Wayte, who was a hatter and hosier near the Haymarket, delivered two parcels, containing the goods mentioned in the indictment, to his apprentice, with directions to carry them to the house of Mr. Heath, a hosier, in Milk-street, Cheapside. As the apprentice was going up Ludgate-hill, with the parcels under his arm, he was met by the prisoner at the bar, who asked him where he was going ? To which the apprentice answered, " to Mr. Heath's." The prisoner, producing a small parcel, replied, " I know your master, " and I owe him for those parcels. I was going for them to your " shop ; therefore do you give me your parcels, and take this back " to your master. There is a letter inside, and it must be immediately forwarded to Mr. Brown." The apprentice accordingly consented to the proposed exchange, and delivered the two parcels to the prisoner, and the prisoner delivered his parcel to the apprentice. The prisoner, having effected this exchange, endeavoured to separate himself from the apprentice ; but his manner created a slight degree of suspicion in the apprentice's mind, who, to satisfy his doubts, ran after the prisoner, and asked him if he was the Mr. Heath to whose house he was conveying the parcels ? The prisoner replied, that he was Mr. Heath ; and desired the apprentice to make haste home with the other parcel. The parcel which was delivered by the prisoner contained a collection of old rags of no value ; and he was not the Mr. Heath he pretended to be. The jury were of opinion that the prisoner, by falsely pretending that he was going to the house of the prosecutor for Mr. Heath's parcels had contrived to make this exchange of parcels with an in-

Wilkins's case.
Where the owner of goods sent them by his servant to be delivered to A., and the prisoner fraudulently procured the delivery of them to himself, by pretending to be A., it was holden to be larceny.

(s) *Rex v. Sharpless and Greatrix*, O. B. 1772. 1 Leach 93. 2 East. P. C. c. 16. s. 105. p. 675. In the debate on *Semple's case*, (2 East. P. C. c. 16. s. 112. p. 692, 693.) a case was mentioned as having been determined very lately by the Judges, where a man ordered a pair of candlesticks from a silversmith to be sent to his lodgings, whither they were sent accordingly, with a bill of parcels by a servant ; and the prisoner contriving to send the servant back, under some pretence, kept the goods ; and it was ruled to be felony, although they were

delivered with the bill of parcels ; such delivery being made under an expectation by the owner of being paid the money ; for the jury found that it was a pretence to purchase with intent to steal. Mr. East, however, remarks upon this case, that it must be understood that the prisoner ran away with the goods, or did some other act to denote an intention of withdrawing himself from any account of them ; and that no credit was intended to be given him, but that it was meant as a sale for ready money only. 2 East. P. C. *ibid.* note (a).

tent wrongfully to obtain and convert to his own use the goods mentioned in the indictment; and therefore they found him guilty. The court, however, being doubtful whether, under all the circumstances, the crime amounted to felony, the judgment was respited, and the case referred to the consideration of the twelve Judges, who were unanimously of opinion that the conviction was right. The learned Judge (Gould, J.,) who delivered their opinion, said, that it appeared to him that the prisoner's having obtained these goods fraudulently from the apprentice was just the same as if he had obtained them from the actual possession of the master. (t)

Hench's case. Fraudulently obtaining a chest of tea from the India House, though by means of a request note and permit, holden to be larceny.

The prisoner, Robert Hench, was indicted for stealing a chest and fifty-nine pounds weight of tea, which, in one count of the indictment, were stated as the property of James Layton and W. J. Thompson; and, in another count, as the property of the East India Company. The facts were, that Messrs. Layton and Co., who were tea brokers, had purchased the chest of tea in question, No. 7100, at the East India House, but had not taken it away, when the prisoner, who was in no way employed by them, went thither, and, going up to the place where the request papers were kept, selected one of them, and then proceeded, with the paper in his hand, as if to look for a chest of tea corresponding with the number on the paper. The servant in the India House who had the care of the request papers, seeing him so engaged, went up to him, took the paper which was in his hand, and, seeing the number 7100 upon it, pointed to a chest with a corresponding number, and said that was the chest he wanted; and then returned the paper to him, in order that he might go to the permit office, and get a permit. The prisoner then went to the permit office, and shortly afterwards returned with a permit to the India House, where the same servant who had the care of the request papers received the permit from him, and asked him whose partner he was; and, upon his answering "Noton's," returned the permit to him again, and entered the name of Noton in the book. The prisoner then took away the chest of tea. Upon this evidence the jury found the prisoner guilty; when an objection was taken by his counsel, that, as the possession of the property was obtained by a regular request note and permit, the offence could only be considered as a misdemeanor; and the court reserved the point for the consideration of the twelve Judges. But they were clearly of opinion, that the offence amounted to felony. (u)

Aickles's case. The prisoner agreed with the prosecutor to discount a bill of exchange for him, and the bill was delivered into the prisoner's

The prisoner, John Henry Aickles, was indicted for stealing a bill of exchange of the value of a hundred pounds, the property of Samuel Edwards. The following facts appeared in evidence. Mr. Edwards, wishing to get his own note of hand discounted, had made application to several persons in the discounting line of business for that purpose. A few days afterwards the prisoner, a total stranger to Mr. Edwards, left an address at his lodgings while he was from home, "Mr. H. No. 21, Great Pulteney-street,

(t) Wilkins's case, O. B. 1789, 1 Leach 520. 2 East. P. C. c. 16. s. 104. p. 673.

(u) Hench's case, O. B. Oct. 1810, Hil. T. 1811, MS.

"from six to seven in the evening, or from eleven till twelve in the morning." In consequence of this address, Mr. Edwards the next morning called upon the prisoner in Pulteney-street; and a conversation upon the subject of money transactions took place between them, when the prisoner told Mr. Edwards that he was in the discounting line, and would, whenever he chose, discount a bill for him at the usual premium of two and a half per cent. agency, provided it was drawn upon and accepted by a person of known credit and responsibility. About three weeks after this interview, Mr. Edwards again called upon the prisoner; but not finding him at home, he sent his clerk the next day, to enquire whether he would discount a bill of one hundred pounds, accepted by Mr. Wells, of Cornhill, and to request that he would call in the city, that he might be fully satisfied of its validity. The prisoner returned with the clerk to the house of Mr. Wells, in Cornhill, where he was shewn into a room to Mr. Edwards, who asked him the terms upon which he would discount a bill for one hundred pounds, provided he approved of it. The prisoner answered, that he would do it for two and a half per cent. agency, exclusive of the legal interest for two months. Mr. Edwards immediately delivered the bill described in the indictment into the hands of the prisoner, and referred him to Mr. Wells, the acceptor of it, who was then present, to satisfy himself that it was a genuine acceptance. Mr. Wells said, that the acceptance was his handwriting. The prisoner then told Mr. Edwards, that if he would go with him to Pulteney-street, he would give him the cash; to which Mr. Edwards replied, that he could not conveniently go himself, but that his clerk should attend him, and pay him the twenty-five shillings agency, and the discount, on receiving the hundred pounds. As the prisoner and the clerk departed, Mr. Edwards whispered the clerk not to leave the prisoner without receiving the money, nor to lose sight of him; and promised to follow them in half an hour. The prisoner and the clerk accordingly proceeded together to the prisoner's lodgings in Pulteney-street. When they arrived, the prisoner shewed the clerk into the parlour, and desired him to wait while he fetched the money; saying, that it was only about three streets off, and that he should be back again in a quarter of an hour. The clerk, however, followed him down Pulteney-street; but, having lost sight of him as he turned the corner of another street, walked backwards and forwards in the street for a length of time, in hope of seeing him return. The prisoner did not come back again; and the clerk, being joined by Mr. Edwards, went again to the prisoner's lodgings, and both of them waited there three nights, in the vain expectation of the prisoner's return. A few days afterwards he was taken, and upon his apprehension expressed his sorrow for what had happened, made several apologies for his misconduct, and promised to return the bill.

It was objected by the prisoner's counsel, that these facts did not amount to felony. But the court left the case with the jury to consider, first, Whether they thought that the prisoner had a preconcerted design to get the note into his possession with an intent to steal it; and, secondly, Whether the prosecutor intended

hands. The prisoner then said, that if the prosecutor would come to his lodgings, he would give him the cash. The prosecutor did not go himself, but sent his clerk, whom he desired not to lose sight of the prisoner till he had got the money. The prisoner contrived to get away from the clerk with the bill, and without paying the money; and this was holden to be larceny; the jury finding a preconcerted design by the prisoner to get the bill into his possession with intent to steal it.

to part with the note to the prisoner without having the money paid before he parted with it? The jury found the affirmative of the first, and the negative of the second question; and concluded that the prisoner was therefore guilty. And this conviction was holden right upon reference to all the Judges. (x)

Oliver's case. The prisoner offered to accommodate the prosecutor by giving him gold for bank-notes, upon which the prosecutor put down a number of bank-notes for the purpose of their being so exchanged. The prisoner took up the notes and made away with them. And this was holden to be larceny, if the jury believed that the prisoner intended to run away with the notes, and not to return with the gold.

The prisoner was indicted for stealing bank-notes to the amount of thirty-five pounds, the property of William Smith, under the following circumstances. The prisoner, being in possession of a quantity of gold coin went into a room in a public-house, in the neighbourhood of Newcastle-upon-Tyne, when the prosecutor, who was a gentleman's servant, and who had about him notes belonging to his master, to a considerable amount, happened to come into the same room. Soon afterwards the prisoner took an occasion to make a display of his gold, when a conversation respecting it ensued between him and the prosecutor; the prosecutor expressing a wish that the prisoner would oblige him by letting him have some gold in exchange for notes and silver, not at an advanced price, but at its legal currency. The prisoner stated, that if it would be any accommodation to the prosecutor, and the prosecutor would do him the same kindness on a future occasion, he would let him have some gold for his notes and silver; and the exchange took place to a small amount. The prisoner then observed, that if it would be of any material service to the prosecutor, he would procure him a considerable further quantity of gold, if the prosecutor would lay down notes to the amount. Upon this the prosecutor put down thirty-five pounds, in bank notes, for the purpose of receiving back their amount in gold; and the prisoner took them up, and went out of the house with them, promising to return immediately with the gold. The prisoner did not return; and the prosecutor never saw him again till he was apprehended. Upon these facts, Wood, B., held, that the case clearly amounted to larceny, if the jury believed that the intention of the prisoner was to run away with the notes, and never to return with the gold: and that whether the prisoner had, at the time, the *animus furandi*, was the sole point upon which the question turned; for if the prisoner had, at the time, the *animus furandi*, all that had been said respecting the property having been parted with by the delivery, was without foundation, as the property, in truth, had never been parted with at all. The learned Judge further said, that a parting with the property in goods could only be effected by contract, which required the assent of two minds: but that in this case there was not the assent of the mind, either of the prosecutor, or of the prisoner; the prosecutor only meaning to part with his notes on the faith of having the gold in return; and the prisoner never meaning to barter, but to steal. (y)

So where it appeared that the prisoners decoyed the prosecutor into a public-house, and there introduced the play of cutting cards: and that one of them prevailed upon the prosecutor (who did not play on his own account) to cut the cards for him; and

Property obtained by means of cards, bets, &c.

(x) Aickles's case, O. B. 1784. 1 Leach 294. 2 East. P. C. c. 16. s. 106. p. 675. *Northumberland Sum. Ass. 1811. cited by Gurney, arguend. in Walsh's case, 4 Taunt. 274. 2 Leach 1072.*

(y) Oliver's case, *cor.* Wood, B.,

then, under pretence that the prosecutor had cut the cards for himself, and had lost, another of them swept his money off the table and went away with it: it was considered to be one of those cases which should be left to the jury to determine *quo animo* the money was obtained, and which would be felony, in case they should find that the money was obtained upon a preconcerted plan to steal it. (z)

So if there is a plan to cheat a man of his property under colour of a bet, and he parts with the possession only to deposit as a stake to one of the confederates, the taking by such confederate is felonious. The prosecutor was drawn in to deposit twenty guinea notes on a bet that one of the prisoners could not guess right three times successively on the hiding of a halfpenny by another of the prisoners under a pot: he put the notes in the hands of one of the prisoners, and then the other guessing right, the notes were handed over. The question was left to the jury whether, at the time the notes were taken, there was not a plan between the prisoners that they should be kept, under the false colour of winning a bet; and the jury so found. Upon a case reserved, the Judges (ten of them being present) held, that the conviction was right, because at the time of the taking the prosecutor parted with the possession only. (a)

In some of the cases of this description, the delivery of the goods taken has been only by way of pledge, or security; but the same doctrine will apply if such delivery were obtained fraudulently, and with intent to steal. This will appear from the following case, where the fraud practised was of the kind commonly described by the term *ring-dropping*.

The prisoner, John Patch, was indicted for stealing a silver watch, steel chain, &c. two pieces of foreign coin, and seven shillings in money, the property of Joseph Bunstead. The evidence of the prosecutor was that the prisoner and two other persons, who made their escape, had joined him in the street; and that, after walking a short space with him, one of them stooped down and picked up a purse, which, upon inspection, was found to contain a ring, and a receipt for 147*l.*, purporting to be the receipt of a jeweller for "a rich brilliant diamond ring." The prisoner proposed that they should go into some public-house to consider in what manner their respective portions of this prize should be divided, and they went accordingly. Various modes of distribution were then suggested; and, at length, the prisoner asked the prosecutor if he would take the ring, and deposit his money and his watch as a security to return it upon receiving his portion of its value. The prosecutor assented to this proposal; and signed a written agreement, dictated by the prisoner, to the

Patch's case. The prisoner, with some accomplices, being in company with the prosecutor, pretended to find a valuable ring. The prosecutor was to have a share of the pretended value of it, and was prevailed upon to deposit his watch, &c. and to take the ring until his share of the value should

(z) *Rex v. Horner and others*, 1 Leach 270. Cald. 295. S. C. The case was one of an application to the court of King's Bench, to bail the prisoners, on the ground that the charge against them amounted only to a *misdemeanor*. Probably it would have been considered as making an essential difference, if the prosecutor

had been playing himself at the time, and had parted with his money under the idea that it had been fairly won. See Nicholson's case, *ante*, 111 & 112.

(a) *Rex v. Robson and others*, East. T. 1820. MS. Bayley, J., Russ. & Ry. 413. This differed the case from Nicholson's case, *ante*, 111 & 112.

be paid. The accomplices of the prisoner made off with the watch, &c.; and the ring proved to be of the value only of ten shillings. It was left to the jury to say whether this was done with a preconcerted plan to obtain the watch, &c.: and the prisoner was found guilty.

effect that when the prisoner, or either of the other two men returned the watch and money, and seventy pounds, he would re-deliver to them the purse and the ring. The prosecutor then laid the watch and money mentioned in the indictment upon the table, and received the ring. After which the prisoner beckoned the prosecutor out of the room, upon a pretence of speaking to him in private; and during this interval the other two men went off with the property. The abrupt manner in which they went away made the prosecutor conceive that he had been defrauded; but the prisoner told him not to be uneasy, for he knew the two men very well, and would take care that he should have his money and watch again. The prosecutor, however, secured the prisoner, who then made proposals to him to make the matter up. The ring was valued at ten shillings.

Upon these facts it was objected on behalf of the prisoner, that, as the prosecutor had parted voluntarily with his property, it was a fraud only, and not a felony. But the court referred it to the jury to consider whether the whole transaction was not an artful and preconcerted scheme, in the three men, feloniously to obtain the prosecutor's watch and money; and whether the prisoner and the other two men were not all in concert together to procure, by such a pretext, any man's money whom they might meet, and to embezzle it; or, in other words, to steal it. And the jury found the prisoner guilty. (b)

Moore's case. Where the prisoner induced the prosecutor to deliver twenty guineas and four doubloons, by way of pledge for a counterfeit jewel pretended to be found, with intent to steal the money, it was holden to be larceny.

The prisoner, Humphrey Moore, was indicted for stealing twenty guineas and four doubloons, the property of John Field. The prosecutor was walking along the street, when a stranger joined company with him; and, after walking a little way in conversation together, the stranger suddenly stopped, and picked up a purse which was lying at a door. After they had proceeded about forty yards, the stranger proposed that they should go and drink a pot of porter, and see what they had picked up. The prosecutor was persuaded to comply; and they accordingly went into a private room, in an adjacent public-house, where the stranger pulled out the purse, and from one end of it produced a receipt, signed W. Smith, for 210*l*. "for one brilliant diamond "cluster ring," and from the other end he pulled out the ring itself. A conversation then ensued upon the subject of their good fortune, during which the prisoner entered the room; when the ring was shewn to him; and, after praising the beauty of its lustre, he offered to settle the division of its value. The stranger lamented that he had no money about him, upon which the prisoner asked the prosecutor if he had any. The prosecutor re-

(b) Patch's case, O. B. 1782, *cor.* Gould, J., Perryn, B., and Buller, J., 1 Leach 238. 2 East. P. C. c. 16. s. 107. p. 678. It appears that the court proceeded upon the authority of Pear's case (*post.* 127). And it is stated that their opinion was founded on this, that the *possession was obtained by fraud*, and the property not altered; for the prosecutor was to

have it again; and that, therefore, it was not like the case of goods sold on credit, where the buyer means immediately to convert them into money, and is not able, nor intends to pay for them; for there the buyer gets the absolute property by the act and consent of the owner. 2 Rast. P. C. c. 16. s. 107. p. 679.

plied that he had forty or fifty pounds at home, and the prisoner said that such a sum would just do. They all three then went to the prosecutor's lodgings at Chelsea, where the prosecutor got the money; and they then went to a public-house in the neighbourhood, where the prosecutor put down twenty guineas and four doubloons, which the stranger, in the presence of the prisoner, took up, and in return gave the prosecutor the ring; desiring that he would meet him at the same place, on the next morning at nine o'clock, and promising that he would then return to him the twenty guineas and the four doubloons, and also give him one hundred guineas for his share of the ring. It was also appointed that the prisoner should be there, and agreed that the prosecutor and the stranger should give him a guinea each for his trouble. The prisoner and the stranger went away together. The prosecutor attended the next morning pursuant to the appointment, but neither of the other parties came. The ring was of a very trifling value.

It was left with the jury to consider, upon these facts, whether the prisoner and the stranger were not confederated together, for the purpose of obtaining money, on pretence of sharing the value of the ring, and whether he had not aided and assisted the stranger to obtain the money by the means which were used for that purpose. And the jury being of opinion he was so confederated with the stranger, and aiding and assisting him, found the prisoner guilty, subject to the opinion of the Judges whether the offence amounted to felony. The case being submitted to their consideration, and eleven of them being present, the majority (nine of them) were of opinion that the guineas and the doubloons were deposited in the nature of a pledge, and not as a loan; so that, though the possession was parted with, the property was not; (more especially as to the doubloons, which the prosecutor clearly understood were to be returned the next day in specie) and therefore as the prisoner had obtained them with a fraudulent intent to apply them to his own use, the offence became felony, from the *intention with which he gained the possession*. And they also held that, as the prisoner and his companion were acting in concert together, they were equally guilty. The other two Judges thought that the doubloons were to be considered as money, and that the whole was a loan on the security of the ring, which the prosecutor believed to be of much greater value than the money he advanced upon it, and that therefore he had voluntarily parted with the property as well as the possession. And they said that when money was delivered by a man on such an occasion, it was not in his contemplation to have the same identical money back again. (c)

The prisoner, John Watson, was indicted for stealing several

(c) Moore's case, O. B. April Sessions, 1784. 1 Leach 314. 2 East. P. C. c. 16. s. 107. p. 679. In Marsh's case, O. B. October Sessions, 1784, 1 Leach 345. a similar question was reserved; and afterwards the prisoner was informed that as his case was exactly similar to that of Moore, and

no ground either in law, or in fact, for making any distinction between them, the Judges had declared their opinion that the taking amounted to a felonious taking; and the prisoner was sentenced to be transported for fourteen years.

Watson's case. The prisoner induced a person to deliver bank-notes to him, by the fraud of *ring-dropping*, and upon the usual agreement that the notes should be returned, and the value of the jewel divided. Held to be larceny.

bank-notes of the value of 100*l.*, the property of John Smith, in his dwelling-house, against the statute 12 Ann. c. 7. The facts were these: Mary Smith, the prosecutor's wife, stated, that as she was going along the street the prisoner stooped down, picked up a small parcel, and said that he had got a prize: upon which she cried, "Halves," and said it was usual to give half of what was found. They went together into St. James's Park, where they examined the parcel in the presence of another man, (who appeared to be an accomplice of the prisoner's,) and found in it a locket with a large stone, and a paper purporting to be the receipt of a jeweller for 250*l.* for a diamond locket. The prisoner said his name was Smith, that he was the captain of a ship, and that he would go to a friend's house, where his cargo was, and bring 100*l.* towards paying the witness her share. He went accordingly, was absent about fifteen minutes, and when he returned, he said that his friend was not at home. After some further proposals respecting the disposal of the locket, it was at length agreed between them, that the locket should be left in the custody of the witness, and that she should deposit 100*l.* in the prisoner's hands as a security to return him the locket the next morning; at which time she was to receive from him half the value of the locket, as mentioned in the receipt found; and she was to have the 100*l.* deposited in the prisoner's hands, as such security as aforesaid, returned back. They then went to the witness's house, where she procured bank-notes to the amount of 100*l.* and laid them on the table, and the prisoner took up the bank-notes, said that they were right, and that he would call the next morning and settle the whole. He then delivered up the locket, went off with the notes, and never returned again. The locket was only of the value of five shillings and sixpence.

Upon this evidence the prisoner was convicted of the simple felony, in stealing the notes: but a case was reserved for the opinion of the Judges upon the objection that this was only a fraud, and not a felony. All the Judges held the conviction proper. (*d*)

Persons acting in concert.

If several act in concert to steal a man's goods, and he is induced by fraud to trust one of them in the presence of the others with the possession of the goods, and then another of the party entice the owner away, in order that the party who has obtained such possession may carry the goods away, all will be guilty of felony, the receipt by one under such circumstances being a felonious taking by all. Standley, Jones, and Webster, conspired to get some money from M'Laughlin, and they pretended that he could not produce 100*l.*, upon which he produced it in notes which Jones took to count and afterwards handed to Standley, and Standley and Webster pretended to gamble for them, Jones then beckoned M'Laughlin out of the room, and Standley and Webster

(*d*) *Watson's case*, O. B. 1794. 3 Leach 640. 2 East. P. C. c. 16. s. 107. p. 680. The case was disposed of by the Judges in Hil. T. 1795, when upon the supposition that the verdict had been taken for the capital offence of stealing in the dwelling-house, (which

at first was thought to have been the case) the Judges all expressed their opinion, that as the notes were in the possession of the prosecutrix, and derived no protection from the house, the case did not fall within the statute, 12 Ann. c. 7. See *ante*, p. 51.

immediately decamped with the money, and all the three afterwards shared it. Upon a case reserved the Judges were unanimous that this was larceny in all the three.^(e) In another case, County and Donovan planned to rob the prosecutrix of some coats, and County got her to go with him that he might get some money to buy them of her, and she left the coats with Donovan who immediately absconded with them; and upon a case reserved, the Judges held the receipt by Donovan to be a felonious taking of the coats by both.^(f)

The following is a case which, upon its being submitted to the consideration of the Judges, underwent a great deal of discussion. The prisoner, John Pear, was indicted for stealing a black mare, the property of Samuel Finch. It appeared in evidence, that the prosecutor was the keeper of a livery stable in the Borough, and that the prisoner on the 2d of July 1779, hired the mare of him, for the day, to go to Sutton in Surrey, and back again; and, upon being asked where he lived, said that he lodged at No. 25 in King-street, and that he should return about eight o'clock in the evening. He did not return as he had promised; in consequence of which the prosecutor went next day to enquire for him according to the direction he had given, but could not find any such person. It turned out that the prisoner sold the mare on the afternoon of the same day on which he hired it, in Smithfield market. The learned Judge, by whom the prisoner was tried, left it to the jury to consider, whether the prisoner hired the mare with the intent of taking the journey which he mentioned, and afterwards changed that intention; and directed them that, if they were of opinion that he did so, they should acquit him, as in such case the mare must have been sold while the privity of contract subsisted: but he directed them to find the prisoner guilty in case they were of opinion that the journey was a mere pretence of the prisoner's to get the mare into his possession, and that he hired her with an intention of stealing her. The jury found the prisoner guilty, and the point was reserved for the opinion of the Judges.

Pear's case. The prisoner hired a horse on the pretence of taking a journey, and almost immediately afterwards sold it. The jury thought that it was hired with the intention of stealing it, and found the prisoner guilty of larceny. And the verdict was approved of by a majority of the Judges after great discussion.

The Judges, after mature deliberation, differed very considerably as to the law of this case. One of them held that it was not felony at common law; because there was no actual taking of the mare by the prisoner. Three others, though they thought that the offence would clearly have been felony by the common law, entertained considerable doubts in consequence of the statutes 33 Hen. VIII. and 30 Geo. II. relating to the offence of obtaining goods by false tokens or false pretences, which statutes made such offences punishable as misdemeanors only. But seven of the Judges were clearly of opinion that the offence was felony.^(g) They held that the obtaining possession of the mare, and afterwards disposing of her in the manner stated was in the construction of law such a taking as would have made the prisoner liable

(e) *Rex v. Standley*, East. T. 1806, MS. Bayley, J., Russ. & Ry. 305.

(f) *Rex v. County*, East. T. 1816, MS. Bayley, J.

(g) It is stated also, that Black-

stone, J., the twelfth Judge who was absent on account of illness, always held that it was felony. 2 East. P. C. c. 16. s. 112. p. 686. in the note.

to an action of trespass at the suit of the owner, if he had not intended to steal her; for she was delivered to the prisoner for a special purpose only, namely, to go to Sutton, which he never intended to do, but immediately sold her. That in this light the case would be similar to what was laid down by Littleton, sect. 71, who says, "if I lend to one my sheep to dung his land, or my oxen to plough the land, and he killeth my cattle, I may have trespass notwithstanding the lending." That if in such a case trespass would have lain, there could be no doubt but that in this case, where the felonious intent at the time of obtaining the possession, was found by the jury, it was felony by the common law. (h)

Charlewood's case.

The prisoner obtained a horse under pretence of hiring it to take a journey, and shortly afterwards sold it. Held to be larceny, the jury finding an intent to steal the horse at the time of hiring it.

The prisoner, George Charlewood, was indicted for stealing a bay gelding, the property of John Houseman. The prosecutor was a livery-stable keeper in Crown-street Soho; and on the 4th October 1785, the prisoner, who was a post-boy, applied to him for a horse, in the name of a Mr. Eley, saying, that there was a chaise going to Barnet, and that Mr. Eley wanted a horse to accompany the chaise, to carry a servant, and to return with the chaise. The gelding described in the indictment was accordingly delivered to him by the prosecutor's servant. The prisoner mounted the horse; and, on going out of the stable-yard, and meeting a friend of his, who asked him where he was going, he said that he was going no further than Barnet. He accordingly proceeded towards Tottenham-court-road, which leads to Barnet, and also, though in some degree circuitously, to Mr. Eley's house. This transaction took place about nine o'clock in the morning; and between three and four o'clock in the afternoon of the same day, the prisoner sold the gelding in Goodman's fields for a guinea and a half, including the bridle and saddle. The horse appeared to have been ridden very hard, and his knees were broken very badly. The purchaser almost immediately disposed of his bargain for fifteen shillings.

On putting this case to the jury, it was stated by the Court, that the Judges in Pear's case, under circumstances similar to the present, had determined, that if a jury be satisfied, by the facts proved, that a person, at the time he obtained another's property, meant to convert it to his own use, it is felony. That there was, however, a distinction to be observed in the present case, though so nice a one as possibly not to be obvious to common understandings. It was this; that if it appeared to them, that the prisoner at the time he hired the horse, for the purpose of going to Barnet, really intended to go there, but that, finding himself in possession of the horse, he afterwards formed the intention of converting it to his own use, instead of proceeding to the place to which the horse was hired to go, it would not amount to a felonious taking. The jury found the prisoner guilty, on the ground that he intended to steal the horse at the time he hired it; and he was afterwards executed. (i)

(h) Pear's case, O. B. 1779. 1 Leach 212. 2 East. P. C. c. 16. s. 112. p. 685. in which latter work the judgment (which is stated to have

been settled and approved by several of the Judges before it was delivered) is given at large.

(i) Charlewood's case, O. B. 1786.

Major Semple was indicted for stealing a post-chaise, and the following facts were proved in support of the charge. The prosecutor, Mr. Lycett, was a coachmaker, who let out carriages to hire. The prisoner was a gentleman who lodged in the neighbourhood under the name of Major Harrold; and had sometimes hired carriages from the prosecutor, as he had occasion for them, and had paid for them with punctuality. On the first of September, 1785, the prisoner hired a post-chaise of the prosecutor, saying, that he should want it for three weeks or a month, as he was going a tour round the North. It was agreed that the prisoner should pay at the rate of five shillings a day during that time; and a price of fifty guineas was talked about, in case he should determine to purchase the chaise on his return to London: but no positive agreement took place between them on the subject of the purchase. In a few days afterwards the prisoner took the chaise from Mr. Lycett's with his own horses, and was driven in it from London to an inn at Uxbridge, where he ordered a pair of horses, and went from thence to Bulstrode, and returned. He then took fresh horses at the same inn at Uxbridge; but where he went with the chaise afterwards did not appear. But it appeared that he never returned it to Mr. Lycett; and that no tidings could be obtained of him till twelve months afterwards, when he was apprehended on some other charge.

Semple's case. The prisoner obtained a post-chaise, by hiring, with an intent to convert it to his own use. And it was holden to be felony, although the contract of hiring was not for any definite time.

It was submitted to the court, on behalf of the prisoner, that upon these facts the offence did not amount to felony; and that the case was distinguishable from those of *Pear (k)* and *Aickles, (l)* inasmuch as in those cases the parties had never obtained the legal possession of the goods delivered to them; whereas, in the present case, the prisoner had obtained the chaise upon a *contract*, which it was not proved that he had broken; as the chaise was not hired for any definite length of time, or to go to any certain place; and the mere understanding that it was for three weeks or a month, for the purpose of making a tour round the North, made no part of the contract. And, even supposing that the contract should be thought not to extend beyond the three weeks or a month, yet, as it was clear that, during that time at least, the prisoner had the legal possession of the chaise, no intention to convert it wrongfully to his own use, arising afterwards, whether from necessity or dishonesty, would make the withholding it felony; as the *animus furandi* must exist at the time the property is obtained. But the court said, that they were bound by the determination of former cases, that it was at that time settled that the question of intention was for the consideration of the jury; and that, in this case, if the jury should be of opinion that the original taking of the chaise was with a felonious intent to steal it, and the hiring a mere pretence to enable the prisoner to

1 Leach 409. 2 East. P. C. c. 16. s. 112. p. 689. Another point was submitted to the consideration of the jury as to a felonious taking after the prisoner's return to London, and

the end and purpose of hiring the horse being determined; but as to this, see *Rex v. Banks, post*, 132.

(k) *Ante*, 124.

(l) *Ante*, 124.

effectuate that design, without any intention to restore or pay for it, it would fall precisely within the principle of Pear's case, and the other decisions which had been made: and the taking would amount to felony. For if the owner only intended to give the prisoner a qualified use of the chaise, and the prisoner had no intention to make use of that qualified possession, but to convert it to his own use, he did not take it upon the contract, and therefore did not obtain the lawful possession of it: but if there were a *bond fide* hiring, and a real intention of returning it at that time, the subsequent conversion of it could not be felony; for by such contract and delivery the prisoner would have acquired the lawful possession of the chaise; in which case his subsequent abuse of that trust would not be felony. That as to there being no proof of actual conversion in this case, it was not necessary; but the jury must judge of it from the circumstances. If the prisoner had staid out six weeks, or two months, and on his return had offered to restore the chaise to the owner, or to pay him for it, such a conduct would have been evidence of an honest intention at the time of the hiring. But there was no account given of it, even up to that moment: and therefore a presumption was raised against the prisoner, which it was incumbent on him to repel; and if he could not, the jury would have to consider, from all the facts in proof, whether the taking were with a felonious intent or not. If it were, the case fell directly within the principle which governed that of Pear's from which it could not be distinguished. The court, therefore, left the question of intention to the jury, who found the prisoner guilty; and he received sentence of transportation for seven years. (m)

Delivery of goods obtained by the fraudulent abuse of legal process.

A delivery of goods obtained by a fraudulent abuse of legal process has been already mentioned as amongst the most aggravated of these cases of larceny where the taking is effected by procuring a delivery of the goods from the owner, or other person authorized to dispose of them. (n) It will generally be a matter of some difficulty to give satisfactory proof of a felonious intent in such a transaction; but if the offence be proved, the severest punishment which it can receive may well be inflicted; for it has been justly observed that such an offence converts the process of the law, which is the best security for property, into an instrument of rapine and plunder. (o)

The books do not furnish many instances of larcenies of this description. But it is laid down that if a person, intending to steal a horse, take out a *replevin*, and having thereby procured the horse to be delivered to him by the sheriff, ride him away; or if a man, intending to steal the goods of another, fraudulently deliver an ejectment, and by obtaining judgment against the casual ejector, get possession of his house, and take his goods; in both these cases the taking will amount to

(m) Semple's case, *cor.* Gould, J., and Adair, Serjt., Recorder, O. B. 1786, 1 Leach 420. 2 East. P. C. c. 16. s. 112. p. 691.

(n) *Ante*, 118.

(o) 1 Hawk. P. C. c. 33. s. 12. 2 East. P. C. c. 16. s. 96. p. 690.

larceny. (p) So if, under pretext or colour of a *capias utlagatum* sued out after an outlawry clandestinely obtained against a visible man, his goods be taken with a felonious intent, it will be felony. (q)

In a case of this description, where the prisoners were indicted for breaking the house of R. Stanyer, putting his wife in fear, and stealing goods, the following facts were proved. The prisoners intending to rifle a house in which a Mrs. Stanyer lived, apart from her husband, went to an attorney, and pretending that Mrs. Stanyer was tenant to one of them, and in arrear for rent, obtained possession of the house by means of a fraudulent ejectment; and at the same time arrested Mrs. Stanyer, by virtue of a writ of *latitat*, and caused her to be carried to prison. The prisoners then rifled the house, and took away the goods, some of which they hid, altered the marks of others, and sold the rest. When they were questioned concerning these acts, and asked what colour of title they had to the house or goods, they could pretend none. And it was proved, that the real landlord had received the rent of the house for many years, and that no rent was in arrear. Neither could the prisoners pretend to any cause of action against Mrs. Stanyer. Upon these facts the jury were directed, that if they believed that the prisoners had done all this with an intent to rob, they ought to find them guilty, which they accordingly did, and both prisoners were executed. (r)

Farr and Chadwick's case. Goods obtained by fraudulent ejectment.

II. Where it appears that the delivery of the goods by the owner, or person authorized to dispose of them, *was not obtained fraudulently*, and with intent to steal, a remaining inquiry may be; —whether such lawful possession has been determined, and whether there has been any new and felonious taking. (s) Thus it has been held, that if a carrier take a pack of goods to the place appointed, and deliver or lay it down, his possession is determined; and if he afterwards carry it away with intent to steal it, this will be a new taking, and felonious. (t)

Delivery of the goods obtained without fraud, and question whether there has been a new and felonious taking.

If the lawful possession has not been determined, the goods will continue in the possession of the party to whom they were delivered by *bailment*; and the general principle of law will prevail, “that if a person obtain the goods of another without fraud, although he have the *animus furandi* afterwards, and convert them to his own use, he cannot be guilty of felony.” (u) A principle which has been holden to extend to the cases of a tailor, who has cloth delivered to him to make clothes with; a carrier who receives goods to carry to a certain place; and a friend who is entrusted with goods to keep for the use of the owner; which they afterwards severally embezzle. (x) And so also, if plate be

(p) 3 Inst. 108. 1 Hale 507. Kel. Leach, 1064, note (a).

43. 1 Hawk. P. C. c. 33. s. 12. 2 East. P. C. c. 16. s. 96. p. 660.

(q) 2 East. P. C. c. 16. s. 96. p. 660. And see cases of a breaking and entering in burglary, effected by fraud, *ante*, 8.

(r) *Rex v. Richard Farr and Eleanor Chadwick*, O. B. 1665. Kel. 43, 44. 2 East. P. C. c. 16. s. 96. p. 660. 2

(s) *Ante*, 118.

(t) 3 Inst. 107. 1 Hale 505.

(u) 3 Inst. 107. 2 East. P. C. c. 16. s. 113. p. 693.

(x) *Staundf. P. C.* 25. 1 Hale 504, 505. 3 Inst. 107, 108. 1 Hawk. P. C. c. 33. s. 2. 2 East. P. C. c. 16. s. 113. p. 693.

delivered to a goldsmith to work or to weigh, or as a deposit, it has been said that his conversion of it will not be a felony. (y) It has, however, been already noticed, that some of the cases of this nature seem to make a near approach to those where a bare charge, or mere special use of the goods, is transferred by the delivery, and where, consequently, the legal possession of them remaining exclusively in the owner, larceny may be committed in respect of them, exactly as if no delivery at all had been made. (z)

Delivery of a horse, &c. upon hire, or loan, *bond fide*.

It appears always to have been considered, that where a horse was delivered upon hire or loan, and such delivery was obtained *bond fide*, no subsequent wrongful conversion pending the contract would amount to felony; and so of other goods. (a) But it was at one time held that when the purpose of the hiring, or loan, for which the delivery was made, had ended, felony might be committed by a conversion of the goods: and consequently, that if the hiring of a horse was limited to a particular time or place, and after that time had expired, or the party had arrived at the proper place for the re-delivery, he rode away with the horse, and converted it to his own use, it was larceny. (b) But this doctrine was considered, and held to be wrong in a case of recent occurrence. The prisoner had borrowed a horse to take a child to a neighbouring surgeon, and after he had done so, and returned, he took the horse in a different direction, and sold it. The jury were satisfied that he had no felonious intention when he borrowed it; but as the purpose for which he hired it was over before he took the horse to the place where he sold it, the jury were directed to convict in order that the point might be considered: and upon the case reserved, the Judges held that there was no felonious taking, and that the conviction was wrong. (c) So that it is now settled, that where the owner parts with the possession of goods for a special purpose, and the bailee, when that purpose is executed, neglects to return, and afterwards disposes of them, if such bailee had not a felonious intention when he originally took the goods, &c.; subsequent withholding and disposing of them, will not constitute a new felonious taking, nor make him guilty of felony. (c)

Leigh's case. The conversion of goods holden not to be felonious, on the ground that the original taking was not with intent to steal.

In the following case a conversion of goods was holden not to be felonious, on the ground that the original taking was not with intent to steal. The prisoner was indicted for stealing various articles, the property of Abraham Dyer. It appeared that the prosecutor's house, in which was a shop containing the muslin and other articles mentioned in the indictment, was on fire; and that his neighbours had, in general, assisted at the time in removing his goods and stock for better security. The prisoner probably had removed all the articles which she was charged with

(y) Show. 52. *arguend.* and citing 3 Hen. 7. 12. 2 East. P. C. c. 16. s. 113. p. 693.

(z) *Ante*, 106. *et sequ.*

(a) 1 Hale 504. 2 East. P. C. c. 16. s. 114. p. 693.

(b) Charlewood's case, 1 Leach 409. 2 East. P. C. c. 16. s. 112. p. 689. and s. 114. p. 694. Tunnard's case, *cor.*

Raymond, C. J., Denton, J., and Hale, B., O. B. 1729. 2 East. P. C. c. 16. s. 112. p. 687., and s. 14. p. 694. 1 Leach 214. note (a).

(c) Rex v. Banks, East. T. 1821, MS. Bayley, J., and Russ. & Ry. 441. And see Rex v. Stock, and other cases *post.* chap. xiv. of *Larceny by Servants*.

having stolen, when the prosecutor's other neighbours were thus employed; and it appeared that she removed some of the muslin in the presence of the prosecutor, and under his observation, though not by his desire. Upon the prosecutor's applying to her next morning, she denied that she had any of the things belonging to him; whereupon he obtained a search warrant, and found his property in her house; most of the articles being artfully concealed in various ways. Upon this evidence it was suggested, on behalf of the prisoner, that she originally took the articles with an honest purpose, as her neighbours had done, and that she would not otherwise have taken some of them in the presence and under the view of the prosecutor; and that, therefore, the case did not amount to felony. The court left the case to the jury; telling them that whether the prisoner took the goods originally with an honest intent, was a question of fact for their consideration: but that even if they were of opinion that she did take them with an honest intent, yet her afterwards hiding them in the various ways proved, and denying that she had them, in order to convert them to her own use, would still support the indictment. The jury, upon this direction, found her guilty; but said that, in their opinion, when she first took the goods from the shop she had no evil intention, but that such evil intention came upon her afterwards. And the case being submitted to the consideration of the Judges, they held the conviction wrong; and were of opinion that upon this special finding there was no felonious taking, but merely a breach of trust: some of them, however, thought that it might have been left strongly with the jury that the subsequent conduct marked the original intention. (*d*)

The privity of a contract may be determined before its regular completion by the tortious acts of the bailee.

A. delivers the key of his chamber to B., who unlocks the chamber and takes the goods of A. with intent to steal them. This has been holden to be felony, for the reason that the goods were not delivered to B. but taken by him; a judgment which appears to have proceeded upon the ground that, by the delivery of the key in this case, it was not in the contemplation of the parties to make a delivery of the goods contained in the room. (*e*) But supposing the key to have been delivered for the purpose of entrusting the party with the care of the goods, still, according to a very good opinion, the taking of the goods out of the room, with a felonious intent, might have been felony; on the ground that, by the act of taking the goods with such an intent out of the room in which they were intended to remain for safe custody, the privity of the contract would have been determined in the same manner as if they had been delivered in a box, and taken out of it afterwards. (*f*)

Privity of contract determined, after delivery, by the tortious acts of the bailee.

(*d*) Leigh's case, *cor.* Lord Eldon, *Wells* Sum. Ass. 1800, and considered by the Judges (Lawrence, J., being absent,) in *Mich. T.* 1800. 2 East. P. C. c. 16. s. 114. p. 694. 1 Leach 411, note (*a*), and MS. The note of Le Blanc, J., as to the opinion of the Judges is, that they thought the pos-

session of the owner continued, and that the evidence of a subsequent taking away was not sufficient, MS. Bayley, J.

(*e*) 1 Hale 505.

(*f*) 2 East. P. C. c. 16. s. 111. p. 685.

Carrier, weaver, &c. taking the goods delivered to them.

Upon the same principle of a determination of the privity of contract by a tortious act of the bailee, it has been holden, that if a carrier open a pack and take out part of the goods, or a weaver take part of the silk which he has received to work, or a miller take part of the corn which has been delivered to him to grind, such takings, if with a felonious intent, will be felony. (*g*) And in a more recent case, it was held that where a warehouseman took all the wheat out of certain bags which had been delivered to him for safe custody, and disposed of it, he was guilty of larceny. The prisoner had received forty bags of wheat to keep in his warehouse for one Neale; having no authority to sell, or to shew samples; he emptied eight of the bags, and sold the wheat they contained, and afterwards filled the bags with inferior wheat; but as it did not appear that he had taken less than the whole of any one bag, the point was saved, whether any larceny had been committed, and the Judges were unanimous that this was a larceny, and that taking the whole out of any one bag, was not less a larceny than taking a part. (*h*)

Distinction in the carrier's case.

With respect, however, to a conversion of goods by a carrier, a notable distinction should be observed, namely, that though if a carrier, to whom a package of goods is delivered to take to a certain place, open the package and take out part of the goods, it will be a felonious taking; yet it will be no felony if he take away the whole package. (*i*) The doctrine seems indeed to savour a little of contradiction, (*k*) and has been considered as standing more upon positive law not at this time to be questioned, than sound reasoning. (*l*) The distinction appears to have proceeded upon the ground that the act of breaking the package is an act of trespass in the carrier by which the privity of contract is determined; whereas, if there be no breaking of the package, no severance of part of the commodity from the rest by the carrier, but the whole of it be parted with by him in the state in which it was delivered to his hands, there will be nothing which will amount to a trespass while the package remains in his possession. And, if this be the true principle of the distinction, it does not seem to make any difference, where there is such a breaking of the package, whether the carrier take the whole or a part only of its contents. (*m*)

It should be mentioned, that in a book of high authority a different principle is assigned for this distinction, namely, that the subsequent act of the carrier, in opening the goods and disposing of them to his own use, "declareth that his intent originally was "not to take the goods upon the agreement and contract of the

(*g*) 3 Inst. 107, 108. 1 Hale 505. 1 Hawk. P. C. c. 33. s. 4.

(*h*) *Rex v. Brasier*, Mich. T. 1817, MS. Bayley, J., and Russ. & Ry. 337.

(*i*) 3 Inst. 107. 1 Hale 504. 1 Hawk. P. C. c. 33. s. 2, 4.

(*k*) See Kel. 83, where the learned reporter says, "I marvel at the case "put 13 Edw. 4. 9 b. that if a carrier "have a tun of wine delivered to him "to carry to such a place, and he "never carry it, but sell it, all this is "no felony; but if he draw part of

"it out, above the value of twelve-pence, this is felony. I do not see "why the disposing of the whole "should not be felony also." As to the part of this passage—"above the "value of twelve-pence," there seems to be no reason why, if a taking to that amount would have been grand larceny, a taking to the value of twelve-pence, or under, might not have been petit larceny.

(*l*) 2 East. P. C. c. 16. s. 115. p. 695.

(*m*) 2 East. P. C. c. 16. s. 115. p. 697.

“ party, but only with a design of stealing them.” (n) But it is well observed, that though such previous intent may appear from the evidence in particular cases ; yet, if it were to be inferred from the mere fact of the carrier’s embezzling the goods, there would be an end of the distinction itself ; for if the taking of goods out of the package be evidence of the carrier’s having originally intended to take the goods, not upon the agreement, but with intent to steal them, *à fortiori* the taking the whole package of goods, whether broken or not, and converting it, must be evidence of such intent. (o)

It will be material, therefore, in cases where goods are charged to have been stolen by a carrier, to shew that the package in which they were contained was broken or opened by him ; but what will amount to sufficient evidence of that fact will depend of course upon the circumstances of each particular case, and will be peculiarly within the province of the jury to determine. In a case where a woman had entrusted a porter to carry a bundle for her to Wapping, and went with the porter, and in going to the place the porter ran away with the bundle, which was lost ; it is reported that a very learned Judge, after telling the jury that if they thought that the porter opened the bundle and took out the goods it was felony, and they ought to find him guilty, further declared it to be his opinion, that the facts, as they have been above stated, were evidence of his having opened the bundle and taken out the goods. (p) But it has been doubted, with great propriety, whether upon the facts, as thus stated, the evidence was sufficient to warrant the jury in finding that the porter opened the bundle, and took out the goods ; (q) and there certainly seem to be better grounds upon which this case might have been decided. (r)

In a modern case it was held, that the master and owner of a ship disposing of some of the goods delivered him to carry, was not guilty of larceny, as it did not appear that he took the goods out of their packages. The prisoner received 280 casks of butter, to carry in a ship of which he was the master and owner ; on the voyage he made a false protest, stating that he had been forced to throw overboard several casks ; and he had in fact stopped at Cowes and disposed of thirteen casks at that place. The indictment contained one count upon 24 Geo. 2. c. 45. and another for a larceny at common law, but upon a case reserved, the Judges held it to be no larceny, either at common law, or under the statute. (s)

(n) Kol. 82.

(o) 2 East. P. C. c. 16. s. 115. p. 696, 697.

(p) Anon. *cor.* Holt, C. J., O. B. 1791, 2 East. P. C. c. 16. s. 115. p. 697. 1 Leach 415. note (a).

(q) 2 East. P. C. c. 16. s. 115. p. 697.

(r) It is stated to have been suggested, in 2 MS. Sum. 235., that a ground for the determination in this case might have been, that all the circumstances of it shewed that the por-

ter took the bundle at first with intent to steal it ; and also to have been suggested by some of the Judges, in the argument on Pear’s case (*ante*, 124,) that the bundle, though delivered, being intended to continue in the owner’s presence, was, in point of law, in her possession. 2 East. P. C. c. 16. s. 115. p. 697, 698.

(s) *Rex v. Maddox*, Mich. T. 1805. MS. Bayley, J., and Russ. & Ry. Cr. Cas. 92.

SECTION II.

Of the Personal Goods in respect of which the Offence of Larceny may be committed.

IN pursuing this part of the enquiry respecting the offence of larceny, there seem to be three points which more particularly require consideration; I. Whether the goods taken were in any way *part of the freehold*; II. Whether they consist of *written instruments*; and III. Whether they consist of *animals, birds, or fish*.

By the common law, larceny cannot be committed of things that are part of the freehold.

I. By the common law, larceny cannot be committed of things which savour of the realty, and are, at the time they are taken, *part of the freehold*; whether they be of the substance of the land, as lead, or other minerals; of the produce of the land, as trees, corn, grass, apples, or other fruits; or things affixed to the land, as buildings, and articles, such as lead, &c. annexed to buildings. (t) The severance and taking of things of this description is, at common law, only a trespass. One reason for which doctrine (though it does not apply to the whole of the articles which have been enumerated) is said to be, that things which are a part of the freehold, being usually more difficult to remove, are less liable to be stolen: (u) possibly also the doctrine may have proceeded upon certain subtilties in the legal notions of our ancestors; (x) and it may perhaps in some measure have originated in the greater security from private depredations of the things which were part of the freehold, than of those which were merely personal, in the earlier times, when articles of provision and other personal chattels (frequently the most valuable) were carried from place to place by the individual tenants, in that attendance in the camp which was exacted by their military tenures. (y)

But they become the subjects of larceny by being severed.

But things, though they savour of the realty, may become the subjects of larceny by being *severed* from the freehold: thus, if stones be dug out of a quarry, wood be cut, fruit be gathered, or grass be cut, larceny may be committed of them. (z) And this will be the case, not only when they have been severed by the owner, but also by the thief himself, if there be an interval between his severing and taking them away; so that it cannot be considered as one continued act. If therefore the thief sever them at one time, whereby the trespass is completed, and they are converted into personal chattels in the constructive possession of him on whose soil they are left or laid, and come again at another time when they are so turned into personalty and take them away, it is

(t) 3 Inst. 109. 1 Hale 510. 1 East. P. C. c. 16. s. 27. p. 587.
Hawk. P. C. c. 33. s. 34. 3 Bac. Ab.
Felony (A). 4 Black. Com. 232. 2
East. P. C. c. 16. s. 27. p. 587.
(u) 1 Hawk. P. C. c. 33. s. 34. 2
(x) 4 Black. Com. 232.
(y) 3 Bac. Ab. *Felony* (A).
(z) 3 Inst. 109. 1 Hale 510.

larceny. (a) Thus though "if a thief severs a copper, and instantly carries it off, it is no felony at common law; yet if he lets it remain, after it is severed, any time, then the removal of it becomes a felony, if he comes back and takes it: and so of a tree which has been some time severed." (b)

This being the common law, and many of the descriptions of property which come within this notion of a connection with the freehold being thereby placed in a very precarious and unprotected situation, the legislature from time to time interfered for their protection, and made the wrongful taking of them in some instances felony, and in others a minor offence, punishable by summary proceedings before a magistrate. These provisions are for the most part amended and consolidated by the recent statute 7 & 8 G. 4. c. 29.

Statutes making it penal to take wrongfully things that are part of the freehold.

The 37th section of that statute enacts, "that if any person shall steal or sever with intent to steal the ore of any metal, or any lapis calaminaris, manganese or mundick, or any wad, black cawke, or black lead, or any coal or cannel coal, from any mine bed or vein thereof respectively, every such offender shall be guilty of felony, and being convicted thereof shall be liable to be punished in the same manner as in case of simple larceny."

Stealing from certain mines.

By the same statute, s. 44, it is enacted, "that if any person shall steal, or rip, cut, or break with intent to steal, any glass or woodwork belonging to any building whatsoever, or any lead, iron, copper, brass, or other metal, or any utensil or fixture whether made of metal or other material, respectively fixed in or to any building whatsoever, or any thing made of metal fixed in any land being private property, or for a fence to any dwelling-house, garden, or area, or in any square, street, or other place dedicated to public use or ornament, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable to be punished in the same manner as in the case of simple larceny; and in case of any such thing fixed in any square, street, or other like place, it shall not be necessary to allege the same to be the property of any person."

Stealing things annexed to buildings, &c.

In a case upon the repealed statutes 4 G. 2. c. 32. and 21 G. 3. c. 68. where the prisoner was indicted for stealing a "window casement made of iron, lead, and glass," the property of the benchers of the Middle Temple, fixed to a certain building situate in Elm-court, it was holden that the case was not within the acts. The court said, that the statutes amongst the several articles which they enumerated did not mention "*a casement*;" and that

Construction of these statutes.

(a) 1 Hawk. P. C. c. 33. s. 34. 4 Black. Com. 233. 2 East. P. C. c. 16. s. 27. p. 587. And so in 1 Hale 510. it is said, "But if a man come to steal trees, or the lead of a church or house, and sever it, and, after about an hour's time, or so, come and fetch it away, this hath been held felony, because the act is not continued but interpolated, and

"in that interval the property lodgeth in the right owner as a chattel; and so it was agreed by the court of King's Bench, 9 Car. 1. upon an indictment for stealing the lead of Westminster Abbey." Dalt. c. 103. p. 166. (new edit. c. 156. p. 501.)

(b) Per Gibbs, Ch. J., *Lee v. Ridson*, M. T. 57 Geo. 3. 7 Taunt. 191.

as the statute 21 Geo. III. c. 68. was made to remedy the defects of the 4 Geo. II. c. 32. which mentioned every specific article by name, the words "any copper, brass, bell-metal, utensil, or fixture," were to be taken as substantive nouns, and not as descriptions of the sorts of fixtures which the legislature intended to protect. (c) Such an offence however would be clearly within the provisions of the recent statute upon an indictment properly framed.

7 & 8 G. 4. c. 29. s. 45.
Stealing chattels or fixtures let to tenants and lodgers.

By the 45th section of the 7 & 8 G. 4. c. 29. for the punishment of depredations committed by tenants and lodgers, it is enacted, "that if any person shall steal any chattel or fixture let to be used by him or her in or with any house or lodging, whether the contract shall have been entered into by him or her or by her husband, or by any person on behalf of him or her or her husband, every such offender shall be guilty of felony, and being convicted thereof shall be liable to be punished in the same manner as in the case of simple larceny; and in every such case of stealing any chattel it shall be lawful to prefer an indictment in the common form as for larceny, and in every such case of stealing any fixture to prefer an indictment in the same form as if the offender were not a tenant or lodger, and in either case to lay the property in the owner or person letting to hire."

Where the prisoner had obtained fraudulent possession of a house upon an agreement for a lease, and stripped it of the leaden pipes, &c. it was holden to be within the act 4 Geo. II. c. 32. now repealed.

In a case where the prisoner was indicted on the repealed statute 4 Geo. II. c. 32. for stealing two hundred weight of lead, fixed to a house and building, the facts were, that the house in question being to be let, the prisoner, giving a false description of his situation in life and his place of residence, obtained possession of it, under a treaty for a lease of it for one and twenty years, which was agreed to be executed; and, in a few days after he had so obtained possession of it, stripped it of the lead on the roof, and of the leaden pipes, &c. The jury said that they were of opinion that he had entered into the contract for the purpose of getting a fraudulent possession of the house; and found a verdict of guilty: and, upon the case being reserved for the opinion of the Judges, though no opinion was publicly delivered, the prisoner afterwards was sentenced to pay a fine of a shilling, and to be imprisoned for two years in the house of correction. (d)

The statutes passed for the better preservation of *timber trees, plants, shrubs*, and other articles, which are the produce of the land, have been consolidated in the recent statute 7 & 8 G. 4. c. 29.

7 & 8 G. 4. c. 29. s. 38.
Stealing trees, shrubs, &c.

The thirty-eighth section of that statute enacts, "that if any person shall steal, or shall cut, break, root up, or otherwise destroy or damage with intent to steal, the whole or any part of

(c) Senior's case, O. B. 1788. 1 Leach 496. 2 East. P. C. c. 16. s. 31. p. 593. The prisoner was afterwards indicted for a similar offence, before Wilson, J., and acquitted upon the authority of this determination. In a former case, *Rex v. Hedge*, 1 Leach 201. 2 East. P. C. c. 16. s. 30. p. 590. note (b), the question appears to have

turned upon whether the window sashes stolen were fixed to the freehold; which was ruled in the negative, upon the facts of the case, which shewed that they were only attached by a temporary fastening.

(d) Munday's case, O. B. 1799. 2 Leach 850. 2 East. P. C. c. 16. s. 31. p. 594.

“any tree, sapling, or shrub, or any underwood, respectively growing in any park, pleasure ground, garden, orchard, or avenue, or in any ground adjoining or belonging to any dwelling-house, every such offender (in case the value of the article or articles stolen, or the amount of the injury done, shall exceed the sum of one pound) shall be guilty of felony, and, being convicted thereof, shall be liable to be punished in the same manner as in the case of simple larceny; and if any person shall steal, or shall cut, break, root up, or otherwise destroy or damage with intent to steal, the whole or any part of any tree, sapling, or shrub, or any underwood, respectively growing elsewhere than in any of the situations hereinbefore mentioned, every such offender (in case the value of the article or articles stolen, or the amount of the injury done, shall exceed the sum of five pounds) shall be guilty of felony, and, being convicted thereof, shall be liable to be punished in the same manner as in the case of simple larceny.”

growing in certain situations, shall be felony, if the value exceeds 1*l*.

Stealing trees, shrubs, &c. growing elsewhere, shall be felony, if the value exceeds 5*l*.

The 39th section enacts, “that if any person shall steal, or shall cut, break, root up, or otherwise destroy, or damage with intent to steal, the whole or any part of any tree, sapling, or shrub, or any underwood, wheresoever the same may be respectively growing, the stealing of such article or articles, or the injury done, being to the amount of a shilling at the least, every such offender, being convicted before a justice of the peace, shall for the first offence forfeit and pay, over and above the value of the article or articles stolen, or the amount of the injury done, such sum of money, not exceeding five pounds, as to the justice shall seem meet; and if any person so convicted shall afterwards be guilty of any of the said offences, and shall be convicted thereof in like manner, every such offender shall for such second offence be committed to the common gaol or house of correction, there to be kept to hard labour for such term, not exceeding twelve calendar months, as the convicting justice shall think fit; and if such second conviction shall take place before two justices, they may further order the offender, if a male, to be once or twice publicly or privately whipped, after the expiration of four days from the time of such conviction; and if any person so twice convicted shall afterwards commit any of the said offences, such offender shall be deemed guilty of felony, and being convicted thereof, shall be liable to be punished in the same manner as in the case of simple larceny.”

S. 39. Stealing trees, shrubs, &c. wheresoever growing, and of any value above 1*l*., punishable on summary conviction for first and second offences; third offence, felony.

The 40th section enacts, “that if any person shall steal, or shall cut, break, or throw down with intent to steal, any part of any live or dead fence, or any wooden post, pale, or rail set up, or used as a fence, or any stile or gate, or any part thereof respectively, every such offender, being convicted before a justice of the peace, shall for the first offence forfeit and pay, over and above the value of the article or articles so stolen, or the amount of the injury done, such sum of money, not exceeding five pounds, as to the justice shall seem meet; and if any person so convicted shall afterwards be guilty of any of the said offences, and shall be convicted thereof in like manner, every such offender shall be committed to the common gaol or house

S. 40. Stealing, &c. any live or dead fence, wooden fence, stile, or gate.

“of correction, there to be kept to hard labour for such term, not exceeding twelve calendar months, as the committing justice shall think fit; and if such subsequent conviction shall take place before two justices, they may further order the offender, if a male, to be once or twice publicly or privately whipped, after the expiration of four days from the time of such conviction.” (e)

S. 41. Suspected persons in possession of wood, &c. not satisfactorily accounting for it.

The 41st section also enacts, “that if the whole or any part of any tree, sapling, or shrub, or any underwood, or any part of any live or dead fence, or any post, pale, rail, stile, or gate, or any part thereof, being of the value of two shillings at the least, shall, by virtue of a search warrant, to be granted as hereinafter mentioned, be found in the possession of any person or on the premises of any person, with his knowledge, and such person being carried before a justice of the peace, shall not satisfy the justice that he came lawfully by the same, he shall on conviction by the justice forfeit and pay, over and above the value of the article or articles so found, any sum not exceeding two pounds.” (f)

S. 42. Stealing, &c. any fruit or vegetable production in a garden, &c. punishable on summary conviction for first offence;

The 42d section enacts, “that if any person shall steal, or shall destroy or damage with intent to steal, any plant, root, fruit, or vegetable production, growing in any garden, orchard, nursery-ground, hot-house, green-house, or conservatory, every such offender, being convicted thereof before a justice of the peace, shall, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour for any term not exceeding six calendar months, or else shall forfeit and pay, over and above the value of the article or articles so stolen, or the amount of the injury done, such sum of money, not exceeding twenty pounds, as to the justice shall seem meet; and if any person so convicted shall afterwards commit any of the said offences, such offender shall be deemed guilty of felony, and being convicted thereof, shall be liable to be punished in the same manner as in the case of simple larceny.” (g)

Second offence felony.

S. 43. Stealing, &c. vegetable productions not growing in gardens, &c.

The 43d section enacts, “that if any person shall steal, or shall destroy or damage with intent to steal, any cultivated root or plant used for the food of man or beast, or for medicine, or for distilling, or for dyeing, or for or in the course of any manufacture, and growing in any land, open or inclosed, not being a garden, orchard, or nursery-ground, every such offender, being convicted before a justice of the peace, shall, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, for any term not exceeding one calendar month, or else shall forfeit and pay over and above the value of the article or articles so stolen, or the amount of the injury

(e) As to the application of forfeitures and proceedings in case of non-payment see the act, ss. 66, 67.

(f) As to the apprehension of offenders see the act, s. 63. and as to

the application of forfeitures and proceedings in case of non-payment, see ss. 66, 67.

(g) As to the apprehension of offenders, &c. see the act, ss. 63, 66, 67.

“done, such sum of money, not exceeding twenty shillings, as to the justice shall seem meet, and in default of payment thereof, together with the costs, (if ordered,) shall be committed as aforesaid, for any term not exceeding one calendar month, unless payment be sooner made; and if any person so convicted shall afterwards be guilty of any of the said offences, and shall be convicted thereof in like manner, every such offender shall be committed to the common gaol or house of correction, there to be kept to hard labour for such term, not exceeding six calendar months, as the convicting justice shall think fit; and if such subsequent conviction shall take place before two justices, they may further order the offender, if a male, to be once or twice publicly or privately whipped, after the expiration of four days from the time of such conviction.” (h)

II. Larceny could not by the common law, be committed of *written instruments*, whether they related to real estate, or concerned mere choses in action. If they related to real estate, the taking of them was considered as merely a trespass and no felony, upon a principle allied to those already mentioned, namely, that they concern the land, or (in technical language) savour of the realty, are considered as part of it by the law, and descend with it to the heir: (i) and when they concerned mere *choses in action*, as bonds, bills, and notes, they were considered at common law not to be goods whereof larceny could be committed, as being of no intrinsic value, and not importing any property in the possession of the person from whom they were taken. (k)

Of larceny of written instruments.

Upon an indictment for stealing a parchment writing, purporting to be a *commission* for ascertaining the boundaries of certain manors, pursuant to an order of the court of Chancery, the goods of our sovereign lord the king; and also another parchment writing annexed thereto, purporting to be a return made to the said commission, the goods of persons unknown; it was found by a special verdict, that the prisoner was guilty of privately taking away these parchment writings, being of the value of one penny each, with intent to steal them. In the course of the argument, it was urged by the counsel for the crown, that the reason why felony could not be committed of charters which concerned the realty, was that they could not be valued; but that the reason would not apply in this case, because a value had been affixed by the jury; and that it was well known that for certain purposes old parchments will sell for a considerable price: and it was also urged, that the relation to the realty did not alone constitute the exemption, as there could be no doubt that it would be felony to steal an heir loom, though that savours of the realty. The court, however, were unanimously of opinion, that as the parchment writings in question concerned the realty, no larceny could be committed of them. (l)

Westbeer's case. Parchment writings which concern the realty.

(A) As to the apprehension of offenders, &c., see the act, ss. 63, 66, 67.

(f) 3 Inst. 109. 1 Hale 510. 1 Hawk. P. C. c. 33. s. 35. 4 Black. Com. 234. 2 East. P. C. c. 16. s. 34.

p. 596.

(k) 1 Hawk. P. C. c. 33. s. 35. 4 Black. Com. 234. 2 East. P. C. c. 16. s. 36. p. 597.

(l) Westbeer's case, O. B. 1739. 1

Box, &c. in which they are kept.

The doctrine of charters and other written assurances concerning the realty not being the subjects of larceny was carried so far, that it was holden that no larceny could be committed of the box or chest in which they were kept. (m)

These defects of the common law have been remedied by 7 & 8 Geo. 4. c. 29.

Stealing, &c. of wills.

The 22d section of this statute enacts, "that if any person shall either during the life of the testator or testatrix, or after his or her death, steal, or for any fraudulent purpose destroy or conceal, any will, codicil, or other testamentary instrument, whether the same shall relate to real or personal estate, or to both, every such offender shall be guilty of a misdemeanour, and being convicted thereof, shall be liable to any of the punishments which the court may award as hereinbefore last mentioned (viz. at the discretion of the court, transportation beyond the seas for seven years, or such other punishment by fine or imprisonment, or by both, as the court shall award) and it shall not in any indictment for such offence be necessary to allege that such will, codicil, or other instrument, is the property of any person, or that the same is of any value."

The stealing of writings relating to real estate.

The 23d section enacts, "that if any person shall steal any paper or parchment, written or printed, or partly written and partly printed, being evidence of the title, or of any part of the title, to any real estate, every such offender shall be deemed guilty of a misdemeanour, and being convicted thereof, shall be liable to any of the punishments which the court may award, as hereinbefore last mentioned; and in any indictment for such offence, it shall be sufficient to allege the thing stolen to be evidence of the title, or of part of the title, of the person, or of some one of the persons having a present interest, whether legal or equitable, in the real estate to which the same relates, and to mention such real estate, or some part thereof, and it shall not be necessary to allege the thing stolen to be of any value."

These provisions as to wills and writings shall not lessen any remedy which the party aggrieved now has.

The 24th section provides "that nothing in this act contained relating to either of the misdemeanours aforesaid, nor any proceeding, conviction, or judgment to be had or taken thereupon, shall prevent, lessen, or impeach any remedy at law or in equity which any party aggrieved by any such offence, might or would have had, if this act had not been passed; but nevertheless the conviction of any such offender shall not be received in evidence in any action at law or suit in equity against him; and no person shall be liable to be convicted of either of the misdemeanours aforesaid, by any evidence whatever, in respect of

Leach 12. 2 East. P. C. c. 16. s. 34. p. 596. The special verdict and the indictment were removed into the court of King's Bench by certiorari in Trin. T. 1740. A question appears to have been raised, after the court had decided upon the point stated in the text, whether the prisoner should be discharged or receive judgment on this indictment as for a *trespass*: but it was determined without much diffi-

culty that no such judgment could be given. 1 Leach 14, 15.

(m) Staundf. 25 b. 1 Hale 510. And the same law is laid down in 3 Inst. 109. as to the box or chest, though it be of great value; and the reason given is, that "it shall be of the same nature the charters be of; *et omne majus dignum trahit ad se minus.*"

“ any act done by him, if he shall at any time previously to his being indicted for such offence have disclosed such act on oath, in consequence of any compulsory process of any court of law or equity in any action, suit, or proceeding, which shall have been *bond fide* instituted by any party aggrieved, or if he shall have disclosed the same in any examination or deposition before any commissioners of bankrupt.”

With respect to stealing, &c. of records and other proceedings of courts of justice, the 21st section of the same statute enacts that if any person shall steal, or shall for any fraudulent purpose take from its place of deposit for the time being, or from any person having the lawful custody thereof, or shall unlawfully and maliciously obliterate, injure, or destroy any record, writ, return, panel, process, interrogatory, deposition, affidavit, rule, order, or warrant of attorney, or any original document whatsoever, of or belonging to any court of record, or relating to any matter, civil or criminal, begun, depending, or terminated in any such court, or any bill, answer, interrogatory, deposition, affidavit, order, or decree, or any original document whatsoever of or belonging to any court of equity, or relating to any cause or matter begun, depending or terminated in any such court, every such offender shall be guilty of a misdemeanour, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to suffer such other punishment by fine or imprisonment, or by both, as the court shall award; and it shall not, in any indictment for such offence be necessary to allege that the article, in respect of which the offence is committed, is the property of any person, or that the same is of any value.”

Records.
The stealing,
&c. of records
and other pro-
ceedings of
courts of jus-
tice.

By the 5 Geo. 4. c. 30. any person who shall in *Ireland*, steal, take, or secretly or forcibly carry away any record; deed, security, or instrument, or any paper, parchment, or piece of vellum relating to the proceedings in the courts of justice in *Ireland*, or concerning the business of any person holding office, and deposited in the courts, or in the castle of Dublin, &c. is declared to be guilty of felony, punishable by transportation or imprisonment.

Records, &c.
in *Ireland*.

It has been observed that written instruments which concerned mere *choses in action*, as being of no intrinsic value, and not importing any property in possession of the party from whom they were taken, were not at common law the subjects of larceny; (*n*) which offence can be committed only in respect of goods which have some worth in themselves, and do not derive their worth merely from their relation to some other thing. (*o*) But the legislature found it necessary to interfere upon this subject, and make the stealing of *choses in action* in many instances an offence of the degree of felony.

Choses in
action.

The 2 Geo. 2. c. 25. s. 3. (which was passed in the first instance for five years, but revived and made perpetual by 9 Geo. 2. c. 18. and is now repealed by 7 & 8 Geo. 4. c. 27. except so far as such repeal may be considered to be qualified by the second section of

2 Geo. 2. c.
25. s. 3.

(*n*) *Ante*, 141.

(*o*) 1 Hawk. P. C. c. 83. s. 35. 2
East. P. C. c. 16. s. 36. p. 597.

that statute,) enacted that if any person or persons should steal or take by robbery any exchequer orders or tallies, or other orders, entitling any other person or persons to any annuity or share in the parliamentary fund, or any exchequer bills, South Sea bonds, bank-notes, East India bonds, dividend warrants of the bank, South Sea company, East India company, or any other company, society, or corporation, bills of exchange, navy bills or debentures, goldsmiths' notes for payment of money, or other bonds or warrants, bills, or promissory notes for the payment of any money, being the property of any other person or persons, or of any corporation, notwithstanding any of the said particulars were termed in law a *chase in action*, it should be deemed and construed to be felony of the same nature and in the same degree, and with or without the benefit of clergy, in the same manner as it would have been, if the offender had stolen or taken by robbery, any other goods of like value with the money due on such orders, tallies, bills, bonds, warrants, debentures, or notes, or secured thereby, and remaining unsatisfied; and that such offender should suffer such punishment as he or she should or might have done, if he or she had stolen other goods of the like value with the monies due on such orders, tallies, bonds, bills, warrants, debentures or notes respectively, or secured thereby, and remaining unsatisfied.

This statute is repealed by 7 & 8 Geo. 4. c. 27. except so far as such repeal may be considered as qualified by the second section of the act, which enacts "that nothing in this act contained shall in anywise affect or alter such part of any act as relates to the post-office, or to any branch of the public revenue, or to the naval, military, victualling, or other public stores of his majesty, &c. except the acts of 31 Eliz. c. 4., and 22 Car. 2. c. 5., which are hereinbefore repealed, or shall affect or alter any act relating to the Bank of England, or South Sea company."

Stealing public or private securities for money, or warrants for goods, shall be felony, and punishable according to the circumstances, like stealing goods.

The statute 7 & 8 Geo. 4. c. 29. s. 5: enacts "that if any person shall steal any tally, order or other security whatsoever, entitling or evidencing the title of any person or body corporate to any share or interest in any public stock or fund, whether of this kingdom, or of *Great Britain*, or of *Ireland*, or of any foreign state, or in any fund of any body corporate, company, or society, or to any deposit in any savings bank, or shall steal any debenture, deed, bond, bill, note, warrant, order, or other security whatsoever, for money or for payment of money, whether of this kingdom, or of any foreign state, or shall steal any warrant or order for the delivery or transfer of any goods or valuable thing, every such offender shall be deemed guilty of felony, of the same nature, and in the same degree, and punishable in the same manner as if he had stolen any chattel of like value with the share, interest, or deposit to which the security so stolen may relate, or with the money due on the security so stolen or secured thereby, and remaining unsatisfied, or with the value of the goods or other valuable thing mentioned in the warrant or order; and each of the several documents hereinbefore enumerated, shall throughout this act be deemed for every purpose to be included under and denoted by the words "valuable security."

Rule of interpretation.

In a case upon the statute 2 G. 2. c. 25. s. 3. (now repealed as before-mentioned) where the prisoner was convicted of stealing a note, by which the maker promised to pay to the prosecutor or order a sum of money, but which the prosecutor had not indorsed, it was holden by all the Judges that its not being indorsed was immaterial. (p) In a case upon the same statute where the prisoners were indicted for stealing a bill of exchange, it appeared that when the bill was stolen from the prosecutor, at Manchester, two names only were indorsed upon it; but that when it was negotiated by one of the prisoners, at Leicester, a third name was added to the two other indorsers: upon which it was objected, on behalf of the prisoners, that this being an indictment, in Leicester, for *then and there* stealing a bill of exchange, whereon were indorsed the names of the two first indorsers, it was not supported by the evidence of a bill with an additional name indorsed thereon, at the time the bill was negotiated by one of the prisoners, in Leicester. But the prisoners were convicted: and the point being submitted to the twelve Judges, for their consideration, they all agreed that the addition of the third name made no difference; that it was the same bill that was originally stolen; and, therefore, that the conviction was proper. (q)

In a case upon a statute 15 Geo. 2. c. 13. relating to embezzlements by servants of the Bank of England, which will be mentioned in a subsequent chapter, a prisoner was indicted for stealing certain bills, commonly called exchequer bills; and as it appeared that the person, who signed them, on the part of the government, was not legally authorized so to do, the court held that they were not good exchequer bills, and the prisoner was consequently acquitted. (s)

Exchequer bills not signed by the proper person.

In a modern case it was holden that the *paper and stamps of the notes of a firm of country bankers*, which had been paid by their correspondent banker, in London, and which were re-issuable by the country bankers, were the *valuable property* of such country bankers while they were *in transitu* for the purpose of being re-issued. The indictment consisted of several counts; in some of which the prisoner was charged with stealing "promissory notes;" and in others he was charged with stealing "one hundred and thirty-five *pieces of paper*, each being respectively stamped with a stamp of four shillings, value four shillings, being the stamp directed by the statute in such case made and provided on every promissory note for payment to the bearer on demand of any sum of money not exceeding, &c.; one hundred and eighty-four *pieces of paper*, each being respectively stamped with a stamp of one shilling, &c.; and seventy-seven *pieces of paper*, each being respectively stamped with a stamp of one shilling and sixpence, &c. all the said pieces of paper being so stamped as aforesaid, and being the property, &c.; and each

Clarke's case. The paper and stamps of the notes of country bankers, which have been paid by their correspondent bankers, in London, and are re-issuable by the country bankers, are the valuable property of the country bankers, while *in transitu*, for the purpose of being re-issued, and the subject of larceny at common law.

(p) Anon. East. T. 1781. 2 East. P. C. c. 16. s. 37. p. 598.

(q) Rex v. Austin and King, Lei-

cester Lent Ass. 1783. East. T. 1783. 2 East. P. C. c. 16. s. 37. p. 602.

(s) Aslett's (first) case. 2 Leach 954.

"and every of the said stamps being then available, and of full "force and effect, against the peace, &c." It appeared, in evidence, that the paid notes in question were made up into a parcel by the London bankers, and sent by the mail to the country bankers, who never received them, and were under the necessity of issuing other notes on fresh stamps in their stead. It was also proved that many of the paid notes, so missed, were traced to the possession of the prisoner at the bar under very strong circumstances of suspicion.

The prisoner's counsel objected that the charge being for a larceny, the law required that the property stolen should be of some value; that the notes, in the present instance, having been paid, they were become, both with respect to the money they were intended to secure, as well as to the stamps, mere waste paper; that their former value was extinct; and that before they could again become valuable property, it was necessary they should have been actually *re-issued* by the firm of the country bank. And it was also objected, as to the counts for stealing the stamped pieces of paper, that they could not be sustained; inasmuch as the *stamps*, having been used, were not at the time when they were taken in any way saleable as stamps; that their operation, as stamps, was, at that time, completely finished, and at an end; and that they would not reassume the character of stamps, until the *notes*, to which they were affixed, had undergone the process of being re-issued.

The case was left to the jury, who found the prisoner guilty; upon which the judgment was respited, and the case referred to the consideration of the twelve Judges, whose opinion was afterwards delivered by Grose, J., to the following effect:—"The "question submitted in this case to the consideration of the "Judges was, whether the paper and the stamps are, under the "circumstances of the case, the subjects of larceny at common "law; or, in other terms, whether they are the property of, and "of any value to Messrs. Large and Co. (the country bankers) "who were unquestionably the owners of them. These gentle- "men had paid for the paper, the printing and the stamps of "these papers, which once existed, both in character and in "value, as promissory notes. Their character and value, as pro- "missory notes, were certainly extinct at the time they were "stolen; but, even in this state, they bore about them a capabi- "lity of being legally restored to their former character and pris- "tine value. It was a capability in which these owners had a "special interest and property. The act of re-issuing them would "have immediately manifested their value as papers, for it would "have saved their owners the expence of reprinting other notes, "and of purchasing other stamps, to which expence, it was "proved, they were put, on their being deprived of these papers, "by the crime of the prisoner. In what sense or meaning, there- "fore, can it be said that these stamped papers were not the va- "luable property of their owners? *They were, indeed, only of "value to those owners; but it is enough that they were of value "to them: their value as to the rest of the world is immaterial.* "The Judges, therefore, are of opinion, that, to the extent of the

"price of the paper, the printing, and the stamps, they were valuable property belonging to the prosecutors; and that the prisoner has been legally convicted." (t)

In a case where the prisoner was indicted upon a statute (7 Geo. 3. c. 50. s. 1.) relating to larcenies and embezzlements, by persons employed in the Post-office, and the indictment charged him with secreting a letter, containing certain "*promissory notes*;" it was objected, on his behalf, that the notes contained in the letter could not be considered as promissory notes, the money having been paid to the holders of them, while they possessed the character of promissory notes, by the bankers in London; and that as they had not been re-issued in pursuance of the statutes, they had not been revived, as those statutes direct, and therefore were not good and valid promissory notes: But the case being reserved for the consideration of the twelve Judges, a majority of them were of opinion, that these notes, though not re-issued, still retained the character, and fell within the description of *promissory notes*; that they were, as promissory notes, valuable to the owners of them; and therefore, that the verdict given against the prisoner in this case was right in law. (v) But a case is mentioned in which it was ruled, that it was not felony within the statute of 2 Geo. 2. c. 25. (now repealed as before mentioned) to steal banker's notes completely executed, but which had never been put into circulation; on the ground that no money was due upon them. (w)

But where a party was compelled, by great violence and menace of death, to sign a promissory note on stamped paper previously prepared by the prisoner, and the prisoner was present during the time, and withdrew the note as soon as it was made, it was holden not to be a case within the statute 2 Geo. 2. c. 25. The indictment charged the prisoner with robbing the prosecutor in a dwelling-house, and taking from him a promissory note of the value of 2,000*l.* signed by the prosecutor, against the form of the statute; and another count laid the note as the property of the prosecutor. The facts proved were that the prisoner inveigled the prosecutor to her house, where he was detained by force for several hours, and at length induced, by great violence and menace of death, to sign the promissory note in question. It was dated March 30, 1795, and promised in the usual form two months after date to pay the prisoner, or order, two thousand pounds. And it appeared that the

Ranson's case. Notes of a country bank paid in London, and not re-issued, held to retain the character and fall within the description of promissory notes.

Phipoe's case. Where a party was compelled by great violence to sign a promissory note which had been previously prepared by the prisoner who produced it and withdrew it again as soon as it was signed, the case was holden not to be within the statute 2 Geo. 2. c. 25.

(t) Clarke's case, O. B. 1810. 2 Leach 1036. and Russ. & Ry. 181. In a MS. note of the judgment in this case, with which the author has been favoured, the principle is thus stated, "If a chattel be valuable to the possessor, though not saleable, and of no value to any one besides, it may still be the subject of a larceny."

(v) Ranson's case, O. B. 1812. 2 Leach, 1090, 1093. Russ. & Ry. 232.

(w) Anon, *cor.* Lord Ellenborough, C. J., *Carlisle*, 1802, mentioned in the notes to 4 Black. Com. 234. and in

note (b), in 2 Leach 1061. But they would probably be deemed valuable property, and the subject of larceny at common law. See Clarke's case, *ante*, 145, 146. Some of the Judges in Ranson's case thought that the acts 2 Geo. 2. c. 25., and 7 Geo. 3. c. 50. were in *pari materia*, and that the term promissory note was to be taken in each act to mean notes on which the money thereby secured still remained due and unsatisfied to the holder thereof:—but the majority of the Judges, as we have seen, differed.

prisoner attempted to get the note discounted the next day, without success; and it was found in her possession when she was apprehended.

The jury having found the prisoner guilty, the case was reserved for the consideration of the twelve Judges; the principal objection to the conviction, as urged by the counsel for the prisoner, being, that the case was not within the statute 2 Geo. 2. c. 25. the note being of no value while in the hands of the prosecutor, and the statute only extending to secure valid existing securities in the possession of the party robbed. It was argued, that nothing could be said to be due on this note as the statute required; and that it never was the property, nor in the possession of the prosecutor, the paper and stamp being the property of the prisoner, and never out of her possession: that the prisoner had in fact acquired the note, not by stealing, but by duress.

It appears that there was considerable difference of opinion amongst the Judges upon this point. It is said, that nine of them expressly held, that the offence was not within the statute; some of them thinking that the statute was only intended to protect existing available notes in the hands of the person from whom they were taken; and that this note did not come within that description, being of no value in the hands of the prosecutor; and others inclining to think that the note was of value from the moment it was drawn; but that it never was in the possession of the prosecutor, but continued all the time in the possession of the prisoner herself, by whose duress the prosecutor was compelled to make it. And Eyre, C. J., observed, that the property never existed till the force, but arose out of it; and that, therefore it was different from the case of money. And admitting that if the prosecutor had brought the note in his pocket, it would have been a case within the act, though the note would not be available while in his possession (upon which point he should have hesitated :) yet this was not that case. But all the nine Judges considered that the whole transaction was one continued act, and that the note was procured by duress, and not by stealing. One of the Judges, (Ashhurst, J.) who differed, thought that it was not a single act, but that there was a distinguishable interval between the writing of the note, and the actual taking of it by the prisoner, during which the prosecutor had the possession of it; and that therefore it was taking from him an instrument of value within the meaning of the statute, as it would have been available against him in the hands of an innocent holder. On this ground also, Macdonald, C. B., doubted. The other Judge (Buller, J.) was absent.

The opinion of the majority of the Judges was afterwards delivered by Ashhurst, J. He stated, "that as the legislature at the time of passing the statute 2 Geo. 2. c. 25. s. 3. whereby the stealing a *chose in action* was made felony, could not possibly have a case like the present in contemplation, it was not within that act of parliament; that it was essential to larceny, that the property charged to have been stolen should be of some value; that the note in the present case did not, on the face of it, import either a general or a special property in the prosecu-

“tor; and that it was so far from being of any the least value
 “to him, that he had not even the property of the paper on which
 “it was written; for it appeared that both the paper and the ink
 “were the property of the prisoner; and the delivery of it by her
 “to him could not, under the circumstances of the case, be con-
 “sidered as vesting it in him.” (x)

This authority was cited in a case of recent occurrence, where the prisoner was charged with stealing a *check* upon a banker, which, in some of the counts of the indictment, was described as “a bill of exchange,” and in others as “a warrant for the payment of money.” It was argued, on behalf of the prisoner, that these counts were bad; on the ground that the statute 2 Geo. 2. c. 25., (now repealed as before mentioned) extended only to such instruments as were available securities in the hands of the party from whom they were stolen; that a check on a banker did not create any debt between the drawer and the banker, whose liability to the drawer remained precisely the same as before, and was not altered in any respect by such an instrument; and that, consequently, the check in the present case, not being a security to the prosecutor, could not be averred, as in this indictment, to be either “a bill of exchange,” or, “a warrant for the payment of money,” the property of the prosecutor, and upon which the sum of money, for the payment whereof it was made, was due thereon to him. It was not, however, necessary to press this objection, as the case supplied others of greater importance, which have been already noticed. (y)

Walsh's case.
 Argued that a
check upon a
 banker is not
 within the 2
 Geo. 2. c. 25.

It was decided upon the statute 2 Geo. 2. c. 25. (now repealed as before mentioned) that where an instrument was described in the indictment as a bank post bill, and was not set out, the court could not take judicial notice that it was a promissory note, or that it was such an instrument as under that statute might be the subject of larceny; though it was described as made for the payment of money. The prisoner was indicted for stealing a bank post bill made for the payment of the sum of 100*l.* of lawful money of Great Britain; and it appeared that the bank post bill was in form a promissory note, and therefore would not support the indictment, unless the court could take notice judicially, that a bank post bill was in form a note. The prisoner, however, was convicted, and a motion was made in arrest of judgment, on the ground that at the time the statute 2 Geo. 2. passed, it was not known what a bank post bill was. Upon a case reserved, it appeared that bank post bills were not in use until two years after the statute 2 Geo. 2. had passed, and the Judges thought that they could not take notice, that what was afterwards called a bank post bill, fell within any of the descriptions in that statute; and they also thought that they could not say, as the instrument was not set out, what a bank post bill was; and further, that as the instrument was not what, at the time the statute passed, could properly be called a

Chard's case.
 Bank post
 bill.

(x) *Rex v. Phipoe*, O. B. 1795, and Serjeant's Inn, Feb. 1796, 2 Leach 673. (y) *Walsh's case*, 2 Leach, 1061. Russ. & Ry. 215. *Ante*, 113. 2 East. P. C. c. 16. s. 37. p. 599.

bill, the prisoner should have been acquitted; and a pardon was recommended. (z)

Of Larceny
of animals,
birds, and fish.

III. The third subject of enquiry, under the head of personal goods in respect of which larceny may be committed, arises when the property taken consists either of *animals, birds, or fish*.

Domestic
animals.

With regard to domestic animals, such as horses, oxen, sheep, and the like, there is no doubt whatever that they were the subjects of larceny at common law. (a) And the stealing of many of these animals has been made a capital offence, by an enactment which will be noticed in a subsequent chapter. (b) Domestic birds also, as ducks, hens, geese, turkeys, peacocks, &c. are clearly the subjects of larceny. (c) So also larceny may be committed of their eggs or young ones. (d)

And their
produce.

And as the stealing of such animals is larceny, it is also larceny to steal the produce of them, though taken from the living animals. Upon this ground it was holden by all the Judges, on a case reserved for their opinion, that milking a cow at pasture, and stealing the milk, was larceny. (e) And it has also been holden that larceny may be committed by pulling wool from the bodies of live sheep and lambs with a felonious intent. (f) In one report of this last decision it is given as a part of the opinion of the Judges, to whose consideration the question was referred, that in order "to prevent the thoughtless and wanton frolics which might be played with these trifling kinds of property from being prosecuted as petty larcenies, when perhaps they were unmixed with any fraudulent or felonious design, the law, proceeding upon the idea *de minimis*, requires the property stolen to be of the value of twelve-pence." (g) The distinction, however, between grand and petty larceny, is now abolished by 7 & 8 Geo. 4. c. 29. s. 2. but the application of it in this case seems to have been very questionable. Undoubtedly, the quantity of wool taken, if considerable, would have been a strong additional circumstance in the evidence of felonious intent necessary to sustain a charge of larceny: but supposing the quantity not to have been of greater value than twelve-pence, yet if the felonious intent of the party was manifest, as it might have been from the manner in which the fact was committed, the use to which the property was applied, and the behaviour of the party, there does not appear to have been any good reason why such a taking should not have been considered as petit larceny. (h)

(z) *Rex v. Chard*, Trin. T. 1822. P. C. c. 16. s. 49. p. 618.
Russ. & Ry. 488.

(a) 1 Hale 511. 1 Hawk. P. C. c. 33. s. 43.

(b) *Post*. Chap. XI.

(c) 1 Hale 511. 1 Hawk. P. C. c. 33. s. 43.

(d) *Id. Ibid.* Hale's Sum. 68, 69.

(e) *Anon. cor.* Leigh, Serj. who sat for Bathurst, J., Oxford circuit about 1769. 2 East. P. C. c. 16. s. 49. p. 617. 1 Leach 171.

(f) *Martin's case*, *Northampton* Lent Ass. 1777, 1 Leach 171. 2 East.

(g) 1 Leach 172.

(h) It should be observed also, that in the abstract of *Martin's case*, 2 East. P. C. c. 16. s. 49. p. 618. it is not stated as any part of the opinion of the Judges that the property stolen should be above the value of twelve-pence. And at the conclusion of the report in which that position is advanced, the doctrine appears to be contradicted, where it is said, "if a wicked disposition be discovered, *une disposition à faire un mal chose*,

Where the animals or other creatures are not domestic, but are *feræ naturæ*, larceny may, notwithstanding, be committed of them, if they are fit for the food of man, and dead, reclaimed, (and known to be so) or confined. Thus, if hares or deer be so enclosed in a park, that they may be taken at pleasure; or fish in a trunk or net, or as it seems in any other enclosed place which is private property, and where they may be taken at any time, at the pleasure of the owner; or pheasants and partridges be confined in a mew; or pigeons be shut up in a pigeon-house; or swans be marked and pinioned, or (though unmarked) be kept tame in a mote, pond, or private river; or if any of these creatures be dead and in the possession of any one; the taking of them with felonious intent will be larceny. (i) And of some things *feræ naturæ*, though not fit for food, felony may be committed, if they be reclaimed; in respect of their generous nature and courage, serving *ob vitæ solatium* of princes and noble persons, to make them fitter for great employment; so that larceny may be committed of hawks and falcons, when reclaimed and known to be so; (k) and it may be committed also, it is said, of young hawks, in the nest. (l) But not of the eggs of hawks or swans, though reclaimed; the reason of which seems to be that a less punishment, namely, fine and imprisonment, is appointed for taking them by statute. (m) The stealing a stock of bees seems to be admitted to be felony. (n)

Animals, &c.
feræ naturæ
reclaimed or
dead.

But a different doctrine prevails with respect to animals and other creatures *feræ naturæ* which are *unreclaimed*: as it is considered that no person has a sufficient property in them to support an indictment for larceny. Thus larceny cannot be committed of deers, hares, or conies, in a forest, chase, or warren; of fish, in an open river or pond; of wild fowls, when at their natural liberty; of old pigeons, out of the dove-house; (o) or even of swans, though marked, if they range out of the royalty, because it cannot be known that they belong to any person. (p) But larceny may be committed of the flesh or skins of any of these or other creatures fit for food, when they are killed; because they are then reduced to a state in which a right of property in them may be claimed and exercised. (q)

Animals, &c.
unreclaimed.

"as it is described by Britton, it may be evidence of felony, notwithstanding the trifling quantity of the thing taken."

(i) 2 Inst. 109, 110. 1 Hale 511. 3 Hawk. P. C. c. 33. s. 41. 4 Black. Com. 235. 2 East. P. C. c. 16. s. 41. p. 607.

(k) 1 Hawk. P. C. c. 33. s. 36. 3 Inst. 96, *et sequ.* and 3 Inst. 109. But the statute 37 Ed. 3. c. 19: is repealed by 7 and 8 Geo. 4. c. 27.

(l) 1 Hale 511. This law had relation to the *trained* hawks of former days.

(m) 11 Hen. 7. c. 17. and 31 Hen. 8. c. 12. 1 Hawk. P. C. c. 33. s. 42. 2 East. P. C. c. 16. s. 41. p. 607.

(n) 2 East. P. C. c. 16. s. 41. p. 607. citing *Tibbs v. Smith*, Ray. 33. 2 Black. Com. 392.

(o) 3 Inst. 109, 110. 1 Hale 510, 511. 1 Hawk. P. C. c. 33. s. 39, 40. 4 Black. Com. 235. 2 East. P. C. c. 16. s. 41. p. 607.

(p) 1 Hale 511.

(q) 3 Inst. 110. 1 Hale 511. In 3 Inst. 110, it is said, "But the deer, &c. being wild, yet when he is killed, larceny may be committed of the flesh, and so of pheasant, partridge, or the like; and so note a diversity between such beasts as be *feræ naturæ*, and being made tame, serve for pleasure only; and such as be made tame, and serve

Rough's case. An indictment for stealing an animal *feræ naturæ* must shew that it was either dead, tame, or confined.

It is so clearly established, that those creatures which are *feræ naturæ* can only become the subject of property by being dead, reclaimed, or confined, that it has been holden to be necessary that they should be so described in an indictment for stealing them. The prisoner, having been convicted on an indictment for stealing a pheasant of the value of forty shillings, of the goods and chattels of H. S., the case was referred to the consideration of the Judges; and upon a second conference, and after much debate and difference of opinion, they all agreed that the conviction was bad; that in cases of larceny of animals *feræ naturæ* the indictment must shew that they were either dead, tame, or confined; otherwise they must be presumed to be in their original state; and that it is not sufficient to add "of the goods and chattels" of such an one. (r)

Jones's case. An unqualified person may have a sufficient legal possession of game to support an indictment for stealing it from him.

It has been ruled that though a person be not qualified to keep, or kill, *game*, he may have a sufficient legal possession of animals, &c. coming under that description, whereon to support an indictment for stealing them. The prisoner was indicted for stealing five pheasants, restrained of their natural liberty, the property of the prosecutor: and, upon its appearing from the evidence that the prosecutor was not a qualified person to keep or shoot game, and that he had the pheasants for sale, it was objected that he could have no property in them, nor any legal possession sufficient to support the indictment; that by the several statutes relating to the game laws, unqualified persons are forbidden, under certain penalties, to have pheasants in their possession; and that by one of those statutes authority is given to a justice of the peace to take away from such person any pheasant which he may have in his possession. But the learned Judge held that it was a sufficient legal possession for the purposes of the indictment, and the prisoner was convicted. (s)

Deer, conies, and fish.

The stealing of *deer*, of *fish*, and of *hares* and *conies*, in a warren, &c. has been made punishable by statute, as will be mentioned more particularly in some of the following chapters.

Animals of a base nature.

There is yet another kind of animals to be noticed; namely, those which, though they may be reclaimed, are not such of which larceny can be committed by reason of the *baseness of their nature*. Some animals which, in this country, are now usually tame, come within the class in question; as *dogs* and *cats*. And others which, though wild by nature, are often reclaimed by art and industry, clearly fall within the same rule; as *bears*, *foxes*, *apes*, *monkies*, *polecats*, *ferrets*, and the like. (t) The reason upon which this doctrine appears originally to have proceeded is, that creatures of this kind, for the most part wild in their nature, and not serving, when reclaimed, for food, but only for pleasure, ought not, however the owner may value them, to be so highly regarded by the

"for food, &c. which diversity not being observed, hath made many men to err."

(r) Rough's case, *Surrey* Lent Ass. 1779, and *East*. T. 1779. 2 *East*.

P. C. c. 16. s. 41. p. 697.

(s) Jones's case, *cor.* Grose, J., *Bucks.* Lent Ass. 1809. 3 *Burn. Just. Larceny*, S. 1. p. 84.

(t) 3 *Inst.* 109. 1 *Hale* 511, 512.

law that for their sakes a man should die. (u) And the doctrine extends to the whelps, or young, of such animals: the rule being established, that where no felony can be committed of any creatures that are *feræ naturæ*, though tame or reclaimed, it cannot be committed of the young of such creatures in the nest, kennel, or den. (x)

The doctrine respecting larceny of animals, *of a base nature*, was considered in a late case, where the prisoner was charged in the indictment with stealing "five live tame ferrets, confined in a "certain hutch, &c." the property of Daniel Flower. The evidence brought the fact of taking the ferrets clearly home to the prisoner; and it was also proved that ferrets are valuable animals, and that those in question were sold by the prisoner for nine shillings. But, the jury having found the prisoner guilty, the case was submitted to the consideration of the Judges upon the question, whether ferrets must be considered as animals of so base a nature that no larceny can be committed of them. And the Judges held that judgment ought to be arrested. (y)

Searing's case.
Ferrets are animals of a base nature, and not the subject of larceny.

With respect, however, to dogs, and also beasts and birds, ordinarily kept in a state of confinement, the statute 7 & 8 Geo. 4. c. 29. s. 31. enacts "that if any person shall steal any dog, or shall "steal any beast or bird ordinarily kept in a state of confinement, "not being the subject of larceny at common law, every such offender, being convicted thereof before a justice of the peace, "shall for the first offence forfeit and pay, over and above the "value of the dog, beast, or bird, such sum of money, not exceeding twenty pounds, as to the justice shall seem meet; and "if any person so convicted shall afterwards be guilty of any of "the said offences, and shall be convicted thereof in like manner, "every such offender shall be committed to the common gaol or "house of correction, there to be kept to hard labour for such "term, not exceeding twelve calendar months, as the convicting "justice shall think fit; and if such subsequent conviction shall "take place before two justices, they may further order the offender, if a male, to be once or twice publicly or privately whipped, after the expiration of four days from the time of such conviction."

Dogs and certain beasts and birds, 7 & 8 Geo. 4. c. 29. s. 31. stealing dogs, or stealing beasts or birds ordinarily kept in confinement, and not the subjects of larceny.

The 32nd section enacts "that if any dog, or any such beast, "or the skin thereof, or any such bird, or any of the plumage "thereof, shall be found in the possession, or on the premises of "any person by virtue of a search warrant, to be granted as hereinafter mentioned, the justice by whom such warrant was granted "may restore the same respectively to the owner thereof; and the "person in whose possession, or on whose premises the same shall "be so found, (such person knowing that the dog, beast, or bird, "has been stolen, or that the skin is the skin of a stolen dog or "beast, or that the plumage is the plumage of a stolen bird,)

Persons found in possession of stolen dogs, &c. liable to penalties.

(u) 1 Hawk. P. C. c. 33. s. 36. 4 Black. Com. 236. 2 East. P. C. c. 16. s. 45. p. 614.

(x) 3 Inst. 109.

(y) *Searing's case*, *per* Wood, B., *Hertford Lent Ass.* 1818, MS., and

MS. Bayley, J., and Russ. & Ry. 350. The ferret was originally a native of Africa, but has been for a long time bred, kept, and sold, in this country, as a tame animal.

Killing
pigeons.

"shall, on conviction before a justice of the peace, be liable for the first offence to such forfeiture, and for every subsequent offence to such punishment, as persons convicted of stealing any dog, beast, or bird, are hereinbefore made liable to." (z)

The 33rd section of the same statute enacts "that if any person shall unlawfully and wilfully kill, wound, or take any house-dove or pigeon, under such circumstances as shall not amount to larceny at common law, every such offender, being convicted thereof before a justice of the peace, shall forfeit and pay, over and above the value of the bird, any sum not exceeding two pounds." (z)

SECTION III.

Of the Ownership of the Goods in respect of which Larceny may be committed.

It is necessary that there should be in some person a sufficient ownership of the things stolen; and that they should be stated in the indictment as the goods and chattels of such person.

Joint-tenants,
or tenants in
common
have not an
ownership, as
against each
other, upon
which an in-
dictment for
larceny can be
sustained.

And this ownership must, of course, exist as against the party by whom the goods are taken; and will not, in general, reside sufficiently in any other person, where the party taking the goods has a legal property in them, and a right of possession. So that joint tenants, or tenants in common, of a chattel, cannot be guilty of stealing such chattel from each other. Thus, if A. and B. be joint tenants, or tenants in common, of a horse, and A. take the horse, even *animo furandi*, yet it will not be felony, because one tenant in common taking the whole only does that which he may do by law. (a)

Goods let with
a house or
lodging.

The goods of a ready furnished lodging must be described as the lodger's goods, and not the goods of the original owner. An indictment was for breaking in the day time Anderson's house, and stealing his goods. The goods were the furniture of a room let by Anderson to another person by the week: and, upon a case reserved, the Judges held that the goods should have been described as the goods of such other person, for Anderson was not entitled to the possession, and could not have maintained trespass; and that the conviction was therefore wrong. (b)

(z) As to the apprehension of offenders, see s. 63., and as to the recovery and application of forfeitures, appeal against convictions, &c. see s. 67. *et sequ.*

(a) 1 Hale 513. 2 East. P. C. c. 16. s. 7. p. 558.

(b) Rex v. Belstead, East. T. 1820,

MS. Bayley, J., and Russ. & Ry. 411. and the same point was decided in Rex v. Brunswick, Trin. T. 1824, MS. Bayley, J., and Ry. & Mood. C. C. 27. As to larcenies by tenants and lodgers, see *post*, chap. Of Larceny by Tenants and Lodgers.

We have seen that a feme covert cannot commit larceny of her husband's goods by taking them from the possession of her husband, because in law they are considered as one person, and she has a kind of interest in the goods. (c) And upon the same ground it has been holden, that even a stranger cannot commit larceny of the husband's goods by the delivery of the wife, unless he be her adulterer. (d) But, if the husband bail the goods to a third person, as there will then be a possession in the bailee, distinct from that of the husband, it may be larceny if the wife take such goods with a felonious intent. (e)

Nor has a husband such an ownership of his goods as against his wife, that she or any one, by her delivery, may commit larceny of them.

The last case proceeds upon an exception to the general rule, that a person cannot commit felony of the goods wherein he has a property. (f) He may, under particular circumstances, be guilty of larceny in stealing his own goods, as he may of robbery in taking his own property from the person of another. If A. bail goods to B., and afterwards *animo furandi* take the goods from B., with an intent to charge him with the value of them, it is felony. (g) And so if A., having delivered money to his servant to carry to some distant place, disguise himself, and rob the servant on the road, with intent to charge the hundred with the loss, according to the provisions of the statute, it will be robbery in A. (h) For as against persons so taking even their own goods with a wicked and fraudulent intent, there is a sufficient temporary special property in the bailee or servant to support an indictment. (i) So if a part-owner of property steals it from the person in whose custody it is, and who is responsible for its safety, he is guilty of larceny. The box of a female friendly society established according to 33 Geo. 3. c. 54. containing upwards of fifty pounds, was left in the custody of the landlord of the house where the society met: the prisoner was one of the members, and broke into the landlord's house in the night time, and stole the box. Upon an indictment for burglary and stealing the box and its contents, a case was saved for the opinion of the Judges, upon the question whether considering the situation in which the prisoner stood with respect to this property, the conviction was right, and the Judges, (ten of them being present) were clear, that as the landlord was answerable to the society for the property, it was a right conviction. (k) And if a man steal his own goods from his own bailee, though he has no intent to charge the bailee, but his intent is to defraud the king, yet if the bailee had an interest in the possession (as if he were bound to the crown for the specific appropriation of the goods,) and could have withheld them from the owner, the taking is a larceny. Wm. Marsden had a quantity of *nux vomica*, and, by means of one Cooper, employed Marsh and

A man may, in certain cases, be guilty of larceny, in taking his own goods from a bailee.

(c) Vol. I. p. 19.

(d) *Ibid.*

(e) 1 Hale 513.

(f) *Id. ibid.*

(g) Staundf. 26 a. 3 Inst. 110. 1 Hale 513, 514. 1 Hawk. P. C. c. 33. s. 47. Fost. 123.

(h) Fost. 123, 124. 3 Inst. 110. 4 Black. Com. 231. 2 East. P. C. c. 16.

s. 5. p. 558, and s. 90. p. 654. where the learned author says, that even in this case he sees no objection to laying the property of the goods in the servant.

(i) See also the argument in Beakins's case, 2 Leach 871.

(k) Rex v. Bramley, East. T. 1822, MS. Bayley, J., and Russ. & Ry. 478.

Co. lightermen to enter it for exportation, and carry it to the ship. Exportation exempts it from duty, which is two shillings and sixpence per pound. Marsh and Co. entered it accordingly, and gave bond to the crown for its exportation, and sent it by their lighter to the ship: and on the way to the ship, W. Marsden, J. Marsden, and Wilkinson, who had charge of the lighter, took out the *nux vomica*, and substituted cinders and rubbish, the object being to get the *nux vomica* duty free. The indictment was against J. Marsden and Wilkinson for stealing the goods of Marsh and Co., and upon a case reserved, four of the Judges, Richardson, Burrough, Wood, and Graham, doubted whether this were larceny, because there was no intent to cheat Marsh and Co., or to charge them, but the intent was to cheat the crown, but seven Judges, (Best, J., being absent,) held it a larceny, on the grounds that Marsh and Co. had a right to the possession until the goods reached the ship, and had an interest in that possession, and that the intent to deprive them of that possession wrongfully, and against their will, was a felonious intent as against them, because it exposed them to a suit upon their bond, and that even if there had been no intent as against them, the intent to cheat the crown was in the opinion of most of the seven Judges sufficient to make it a larceny. (l)

The ownership will not be divested from the true owner by an intermediate tortious taking.

The real owner of goods will not be deprived either of the property or possession in law of them by a felonious taking. If, therefore, A. steal the goods of B., and afterwards C. steal the same goods from A., in such case C. is a felon, both as to A. and as to B., and he may be indicted for stealing the goods of B. (m) Upon this subject Gould, J., in delivering the opinion of the twelve Judges in a modern case, said, "It is a rule of law equally well known and established that the possession of the true owner cannot be divested by a tortious taking; and therefore if a person unlawfully take my goods, and a second person take them again from him, I may, if the goods were feloniously taken, indict such second person for the theft, and allege in the indictment, that the goods are my property: because these acts of theft do not change the possession of the true owner." And he further stated it to be his opinion that the doctrine would also hold where the goods are taken from the possession of the true owner by means of *fraud*: as otherwise a man might derive an advantage from his own wrong. (n)

But a distinction is taken in the following case. If A. steals the horse of B., and afterwards delivers it to C. who was no party to the first stealing, and C. rides away with it *animo furandi*, yet C. is no felon to B.: because, though the horse was stolen from B., yet it was stolen by A., and not by C., for C. did not take it; neither is he a felon to A., for he had it by his delivery. (o)

There is no doubt that there may be a sufficient ownership of the goods stolen in a person who has only a *special property* in

Ownership sufficient where there

(l) *Rex v. Wilkinson and others*, s. 90. p. 654.

Mich. T. 1821, MS. Bayley, J., and Russ. & Ry. 470.

(m) 1 Hale 507. 2 East. P. C. c. 16:

(n) By Gould, J., O. B. 1790, in *Wilkins's case*, 1 Leach 522, 523.

(o) 1 Hale 507.

them ; and that they may be laid as the goods and chattels of such person in the indictment. A *lessee* for years, a *bailee*, a *pawnee*, a *carrier*, and the like, have such special property ; and the indictment will be good, if it lay the property of the goods, either in the real owners, or in the persons having only such special property in them. (*p*) So where goods belonging to a guest at an inn are stolen, they may be laid to be the property either of the innkeeper or the guest. (*q*) And linen stolen from a washerwoman, by whom it was taken in to wash in the course of her business, may be laid as her goods. (*r*) In cases of this kind it is considered that the parties have a possessory property ; being answerable to their employers, and being capable of maintaining an appeal of robbery or larceny, and having restitution. (*s*)

is only a special property in the goods.

It has also been holden, that an agister of cattle has such a special property in them that they may be laid as his goods in the indictment. When this case was referred to the Judges, after the conviction of the prisoner, there was at first some doubt upon the point : one of the Judges observing that an agister of cattle is not liable for them at all events, like an innkeeper for the goods of his guest ; but ultimately all the Judges agreed that the conviction was right. (*t*)

In a case where, upon an indictment for stealing a window-glass and hammer-cloth from a carriage, it appeared that the prosecutor, in whom the property was laid, was a coachmaster, and had the care of the carriage, which stood in a coach-house in his yard, at the time the articles were stolen from it ; an objection that the property should have been laid in the owner of the carriage was overruled. (*u*) And a case was at the same time referred to by the court in which a prisoner was convicted of stealing a chariot glass from a lady's chariot which had been put up at a coach-yard at Chelsea, while the owner of it was at Ranelagh ; and the property was laid to be in the master of the yard, where the chariot had been put up. (*x*)

If goods seized under a writ of *feri facias* are stolen, they may be described as the goods of the party against whom the writ issued, for, though they are *in custodia legis*, the original owner continues to have a property in them until they are sold : if he pays the debt he is entitled to have them returned, and his debt to the plaintiff in the suit continues undiminished, until the goods seized are applied to its liquidation. And the sheriff is accountable to the original owner for the goods so seized. A sheriff's officer seized goods under a writ of *feri facias* against J. S., and after-

Ownership where the goods were in *custodia legis*.

(*p*) 1 Hale 513. 1 Hawk. P. C. c. 33. s. 47. 2 East. P. C. c. 16. s. 90. p. 652.

(*q*) Todd's case, O. B. 1711. 2 East. P. C. c. 16. s. 90. p. 653.

(*r*) Packer's case, O. B. 1714. 2 East. P. C. c. 16. s. 90. p. 653. 1 Leach 357 note (*a*).

(*s*) 2 East. P. C. c. 16. s. 90. p. 653.

(*t*) Woodward's case, *Leicester Sum. Ass.* 1796. Mich. T. 1796., and Hil. T. 1797., at which last meeting of the

Judges, 4 Inst. 293. was referred to, as shewing that an agister has a possession, and 2 Rol. Ab. 551. as an authority, that an agister may maintain trespass against any one who takes the beasts. 2 East. P. C. c. 16. s. 90. p. 653. 1 Leach 357. note (*a*).

(*u*) Taylor's case, O. B. 1785. 1 Leach 356.

(*x*) Statham's case, O. B. 1773. 1 Leach 357.

wards stole part thereof. The indictment against him described the goods as the goods of J. S., upon which it was objected that they were no longer the goods of J. S., and should have been described as the goods of the sheriff: but, upon the point being saved, the Judges held that notwithstanding the seizure, the general property remained in J. S., as the loss would fall upon him if they did not go to liquidate the debt, that the seizure left the debt as it was, and that the whole debt continued until the goods were applied towards its discharge. (y)

Ownership,
where the
goods are in
the custody of
servants.

But the indictment will not be sustainable if it appear in evidence that the party in whom the goods are laid had neither the property nor the possession of them; as is usually the case of a feme covert or servant, who have in their custody the goods of the husband or master. (s) In a late case it was decided that the goods in a dissenting chapel vested in trustees could not be described as the goods of a servant who had merely the care of the chapel, and the things in it, to clean and keep them in order, though he had the key of the chapel, and no person except the minister had any other key. The indictment was for stealing the chandelier and sconces of a dissenting chapel vested in trustees: and the things were described as the property of the trustees, and also of one Evans. The evidence as to the property of the trustees failed, and it appeared that Evans was servant to the trustees, and had the care of the chapel and the things in it, for the purpose of cleaning and keeping them in order, and that he had the only keys, except that the minister had a key of the vestry, from whence he could enter the chapel. Upon a case reserved, the Judges were of opinion that the property could not be considered as the property of Evans. (a) But though, generally speaking, the possession of the servant is the possession of the master, (b) yet there are some cases where a kind of special property has been considered to exist in the servant. Respecting the case lately mentioned, of a master delivering money to his servant to carry to a certain place, and then robbing his servant on the road, a learned writer observes, "I see no objection to laying the property of the goods in the servant; for though, in general, it may be said that he has no property in them, as against his master, although he has against every other person; yet having a clear right to defend his possession against A.'s unlawful demand, the special property still remains in the servant. But a taking from the servant of the money or goods of his master, in his presence, by putting in fear, is a taking from the master, and the offender may be indicted for robbing him." (c)

Deakin's case.
Where a box
was stolen
from a stage-

The question concerning the sort of possession, or special property, which a servant may have in the goods of his master, was much discussed in a modern case, where a stage-coach having

(y) *Rex v. Eastall*, Mich. T. 1822. MS. Bayley, J.

(z) 2 East. P. C. c. 16. s. 90. p. 652, 653.

(a) *Rex v. Hutchinson*, East. T. 1820. MS. Bayley, J., and Russ. & Ry. 412.

(b) *Post*, Chap. XVII. On Larceny. &c. by Servants. And *ante*, 106, et seq. as to the distinction between a bare charge and a possession of goods delivered.

(c) 2 East. P. C. c. 16. s. 90. p. 654. *ante*, 155.

been robbed of a box containing a variety of articles, it became material to determine whether the goods so stolen could be laid as the property of the *coachman*. There were three counts in the indictment: but one of them which laid the property in the coach-proprietors failed on account of a variance; another, which laid the property in persons unknown, was rejected by the court as improper in this case; and the case, therefore, necessarily proceeded upon the remaining count, which laid the property in the coachman. It appeared in evidence, that the box was delivered by the servant of a tradesman in London to the book-keeper at the inn from which the coach set off, who called it over amongst other things in the way-bill, and delivered it to a porter, who put it into the coach; and that the coachman, in whom the property was laid, drove the coach to a place about thirty-eight miles from London, during which journey the box was stolen from the coach by the prisoners. It also appeared, that the proprietors of the coach never called upon the coachman to make good any losses, except when they happened by his neglect; and that for goods stolen privately from the coach they never expected any compensation from the driver.

coach on its journey, it was holden that it might be laid as the property of the driver of the coach.

The jury having found the prisoners guilty, the case was saved for the consideration of the Judges; and, after it had been ably argued, a majority of the Judges were of opinion that the property was well laid to be in the driver. Hotham, B., who delivered their opinion, said, that the material question was, whether the driver had the possession of the goods, or only the bare charge of them; but that the case was not open to that distinction: for although, as against his employers the masters of the coach, the mere driver can only have the bare charge of the property committed to him, and not the legal possession of it, which remains in the coach-masters; yet, as against all the rest of the world, he must be considered to have such a special property therein, as will support a count charging them as his goods; for he has in fact the possession of and controul over them; and they are entrusted to his custody and disposal during the journey. And the learned Judge further observed, that the inconvenience would be great indeed, if the law were otherwise: as the difficulties and mistakes which must unavoidably arise in seeking after all the persons concerned as proprietors of a stage-coach, for the purpose of prosecuting an indictment of this nature, would be endless and insurmountable. That the law, therefore, on an indictment against the driver of a stage-coach, on the prosecution of the proprietors, considers the driver to have the bare charge of the goods belonging to the coach; but on a charge against any other person, for taking them tortiously and feloniously out of the driver's custody, he must be considered as the possessor. (e)

Property may be laid as belonging to the real owner though it never was actually in his possession but in the possession of his agent only; as in the following case. Turner as agent for Nash sent up notes to Morgan another of Nash's agents, and Morgan

(e) *Rex v. Deakin and Smith*, O. B. 1800, 2 Leach 875, 876. 2 East. P. C. c. 16. s. 90. p. 653.

as agent for Nash sent them by the coach directed to Walker: and the prisoner stole them from the coach. The indictment having described them as Nash's, it was urged that they could not be so described because Nash never had them except by the hands of his agents; but all the Judges thought they had been rightly described, and held the conviction right. (*f*) But the property cannot be laid in a man who has never had either actual or constructive possession, except as far as it resulted from the possession of the thief and of persons acting under him. Thus where Paul had ordered a hat of Beer and the prisoner sent for it in Paul's name and got it, and was indicted for stealing Paul's hat, the Judges held that the property could not be said to be in Paul. (*g*)

Ownership of
the cloaths,
&c. of child-
ren.

Cloaths, and other necessities provided for children by their parents, are often laid to be the property of the parents, especially while the children are of tender age; but it is holden good either way. (*h*) There are cases, however, of exclusive property in the children. Thus, in a case where the prisoner was charged with stealing wearing apparel, the property of John Wilson, and it appeared in evidence that the wearing apparel had been furnished by John Wilson to his son George, and that the son was nineteen years of age and bound apprentice to his father, who had covenanted to find him in clothing; the court held that the indictment was defective, and that the wearing apparel was exclusively the property of the son, who had been furnished with it in pursuance of the condition of the indentures. (*i*) And in a case which occurred at the Old Bailey above a century ago, upon the court doubting whether the property of a gold chain, which was taken from a child's neck who had worn it for four years, ought not to be laid to be in the father, an ancient clerk of the court said that it had always been usual to lay it to be the goods of the child in such case; and that many indictments which had laid them to be the property of the father had been ordered to be altered by the Judges. (*k*)

Scott's case.
Property of
sheep laid
jointly in a
grandfather
and grand-
children.

In a case where the prisoner was indicted for sheep-stealing, the property was laid in Simon Dodd the elder, Simon Dodd the younger, and several other persons of the same name. The evidence was, that Simon Dodd the elder, and a son of his, who afterwards died, took a farm on their joint concern, and kept a stock of sheep, which was their joint property, upon it; that the son died intestate about five years ago, leaving a widow, who died soon after him, and several children (being the Simon Dodd the younger and the other persons named in the indictment); that no division was ever made of the stock; and that it was from the same stock that all the sheep upon the farm at the time of the felony committed were bred; some before and some after the son's

(*f*) *Rex v. Remnant*, Mich. T. 1807, MS. Bayley, J., and Russ. & Ry. 136.

(*g*) *Rex v. Adams*, East. T. 1812, MS. Bayley, J., and Russ. & Ry. 225.

(*h*) 2 East. P. C. c. 16. s. 91. p. 654. 12 Rep. 113.

(*i*) *Forgate's case*, O. B. 1787, 1

Leach 463.

(*k*) *Anon.* O. B. 1701, 2 East. P. C. c. 16. s. 91. p. 654. 1 Leach 464. note (*a*). If apparel be put upon a boy, this is a gift in the law; for the boy hath capacity to take it. *Haynes's case*, 12 Rep. 113.

death. It was also proved, that Simon Dodd the elder continued to occupy the farm and use the stock as before, considering himself as acting for his grand-children who were still infants, in respect of one moiety; and that he accordingly kept a regular account with them in his books. The prisoner having been convicted, a question was submitted to the consideration of the Judges, whether the property were well laid jointly in the grandfather and grand-children. And the Judges were of opinion that it was well laid; for though in the case of joint traders there was no *jus accrescendi*, and the remedy survived; yet here it was proved, by the evidence of the grandfather, that he held one moiety for his grand-children; and he might make distribution among them. And some of the Judges also said, that the property might have been laid to be in the grandfather alone, who was in possession of the children's moiety as their agent. The Judges were all of opinion that it was not necessary that the property in the thing taken should be the strict legal property. (l)

In another case where the prisoner was indicted for stealing some drapery goods, which were stated in the indictment to be the property of Benjamin Dodge and Sarah Chilcott, widow, it was objected that the property in the goods was misdescribed. The facts, upon which the objection was taken, were that the goods in question had been part of the joint stock in trade of Benjamin Dodge, and one Chilcott, the late husband of Sarah Chilcott, who died a short time only before the theft was committed. He died without a will, leaving Sarah Chilcott and some young children; and no administration of his effects had been granted; but Sarah Chilcott, from the time of his death, acted as a partner, and regularly attended the business of the shop. The goods in question were stolen on the 6th of January, after the death of the husband, who died about the Christmas preceding: and on the 20th of January a division was made of the remaining stock in trade; Sarah Chilcott taking one half, and Benjamin Dodge the other half. Upon these facts it was contended, on the part of the prisoner, that the children, in respect of their interest under the statute of distributions, should have been named with Benjamin Dodge and Sarah Chilcott, as joint proprietors; or that the property should have been alleged to be in the ordinary and surviving partner. But the learned Judge, before whom the prisoner was tried, held that the *actual possession* in Benjamin Dodge and Sarah Chilcott, as owners, was sufficient; upon which the prisoner was convicted: and the Judges afterwards, upon the case being saved for their consideration, held that the conviction was right. (m)

A case has been already mentioned, in which, upon an indictment for stealing pheasants, restrained of their liberty, it appeared in evidence that the prosecutor, in whom the property in the pheasants was laid, was not a qualified person to keep or shoot

Gaby's case. The *actual possession* of the goods by a surviving partner, and the widow of a deceased partner, holden to be a sufficient ownership.

Ownership of game by an unqualified person.

(l) Scott's case, *cor.* Chambre, J. *Northumberland Sum. Ass.* 1801, Mich. T. 1801, 2 East. P. C. c. 16. s. 91. p. 655. Russ. & Ry. 14.

(m) Rex v. Gaby, *cor.* Chambre, J. *Taunton Spr. Ass.* 1810. MS. Russ. & Ry. 178.

game; whereupon an objection was taken that he could not have any property in them, or any legal possession, sufficient to support the indictment, and was over-ruled. (*n*)

Ownership of treasure-trove, estrays, wrecks, &c.

It is laid down, in some of the books, that larceny cannot be committed of things wherein no person has any determinate property; and, therefore, that the taking away treasure-trove, or waif, or stray, before they have been seized by the persons who have a right thereto, cannot be felony. (*o*) But it is observed, that there seems to be some incorrectness in the generality of this position; as, although the lord has no determinate property in waifs, treasure-trove, &c. till seizure, the true owner, though unknown, who has lost, or been robbed of the things, has still a property in them. (*p*) And as to the reason assigned by one writer of these things not being the subject of larceny, namely, the uncertainty of the true owner, (*q*) it is observed, that it, at least, implies that if the owner be known, larceny may be committed of them. (*r*)

Ownership where the person of the owner is unknown.

But, further, it is well settled that larceny may be committed by stealing goods, the owner of which is *not known*: and that it may be stated in the indictment that the things stolen were the goods of a person to the jurors unknown. (*s*) But upon prosecutions of this kind some proof must be given sufficient to raise a reasonable presumption that the taking was felonious, or *invito domino*; and Lord Hale, C. J. said that he never would convict any person for stealing the goods *cujusdam ignoti*, merely because the person would not give an account how he came by them, unless there were due proof made that a felony had been committed of those goods. (*t*) It is said, therefore, with respect to these cases, that the true ground upon which persons, so indicted, may, in any instance, claim to be acquitted, when the other facts, necessary to constitute the crime of larceny, appear upon the evidence, seems to be a want of the proper proof that the taking was felonious, or *invito domino*, and not the want of any property in the true owner, who, by losing his goods, does not lose his property in them until seizure by some other person having a right to seize in such cases. (*u*)

An indictment cannot be sustained for stealing the goods of a person unknown, if it appear that the owner is really known.

It should be well observed, however, with respect to prosecutions for stealing goods of a person unknown, that an indictment, alleging the goods to be the property of a person unknown, will be improper if the owner be really known; and that in such case the prisoner must be discharged of the indictment so framed, and tried upon a new one for stealing the goods of the owner by name. (*x*) In a case where the prisoner was charged with stealing a box of goods from a stage-coach, one of the counts of the indictment, which stated the box to be the property of persons unknown, was

(*n*) Jones's case, *ante*, 152.

(*o*) 3 Inst. 108. 1 Hale 510. 1 Hawk. P. C. c. 33. s. 38.

(*p*) 2 East. P. C. c. 16. s. 40. p. 606, and s. 88. p. 651.

(*q*) Pult de pace 131. And so also in 3 Inst. 108: the reason is given that *dominus rerum non apparet*.

(*r*) 2 East. P. C. c. 16. s. 40. p. 606.

(*s*) 1 Hale 512. 2 Hale 181. 1 Hawk. P. C. c. 33. s. 44. 2 East. P. C. c. 16. s. 88. p. 651. Anon. Dy. 99 a. pl. 61. 283 a.

(*t*) 2 Hale 290.

(*u*) 2 East. P. C. c. 16. s. 88. p. 651. *ante*, 161.

(*x*) 2 East. P. C. c. 16. s. 88. p. 651.

rejected by the court, on the ground that where it was in the power of a pleader to state a legal proprietor, as in this case, by laying the property to be in the persons from whom and to whom the goods were sent, it was improper to lay the property as belonging to persons unknown. (y) And the same principle is stated to have been acted upon in a case where the indictment charged the prisoner as an accessory before the fact to a larceny, and it appeared, from the opening of the case by the counsel for the prosecution, that the grand jury had found the bill upon the evidence of the thief, who was about to be called as a witness to establish the guilt of the prisoner, upon which the learned Judge interposed, and directed an acquittal. (z)

It is said that where felony has been committed by stealing the goods of a person unknown, the king shall have the goods. (a)

The property in the bells, books, or other goods, belonging to a church, has been already spoken of: (b) and we have seen that there can be no property in a dead corpse. (c) If, however, a shroud be stolen from a corpse, it may be laid to be the property of the executors, or whoever else buried the deceased; but not as the property of the deceased himself. (d) And a case is mentioned where several persons were convicted of larceny, in stealing leaden coffins out of the vaults of a church; the coffins being laid as the goods of the executors. (e) If the personal representatives of the deceased cannot be ascertained, or even, as it seems, if it appear probable, from the time which has elapsed since the death, that it might be a matter of some difficulty to ascertain them, it will be sufficient to lay such goods as the property of "a person unknown." In a case where the prisoner was indicted for stealing a leaden coffin, the property of a person unknown, it was objected that, though the coffin had lain in the ground near sixty years, yet, as the same family, of which the deceased had been a member, remained on the spot, and as it did not appear that any enquiry whatever had been made to ascertain the personal representative, there was a want of reasonable diligence in the prosecutor; but it was ruled to be sufficient after so many years had passed. (f) In the same case it was also ruled that a count, laying the coffin as the property of certain persons being the then churchwardens, could not be supported. (g)

Ownership of goods belonging to a church, and of shrouds or coffins in which corpses are deposited.

If a man die intestate, and the goods of the deceased be stolen before administration committed, such goods shall be supposed to be the goods of the ordinary; but if a man die, having made a will and appointed an executor, the goods shall be supposed to be

Of the ownership of the goods of a deceased person.

(y) *Rex v. Deakin and Smith*, 2 Leach 862, *ante*, p. 158.

(z) *Walker's case*, *cor. Le Blanc*, J. *Gloucester* Sum. Ass. 1812. 3 Campb. 264. And see also as to the statement of the principal felon being unknown in the indictment against a receiver of stolen goods, *post* Chap. Of Receiving Stolen Goods.

(a) 1 Hawk. P. C. c. 33. s. 44. 2 East. P. C. c. 16. s. 88. p. 651.

(b) *Ante*, Chap. on Sacrilege.

(c) *Ante*, *Id. ibid.*

(d) *Haynes's case*, 12 Co. 113. and 3 Inst. 110. where the theft is called *furtum inauditum*. 1 Hale 515. 1 Hawk. P. C. c. 33. s. 46. 4 Black. Com. 236.

(e) *Anon.* 2 East. P. C. c. 16. s. 88 p. 652.

(f) *Anon. cor. Buller*, J. *Easter* Lent Ass. 1794. 2 East. P. C. c. 16. s. 89. p. 652.

(g) *Id. ibid.*

the goods of the executor, even before probate is granted to him. (*h*) Neither the ordinary, nor an executor, nor administrator, need shew their title specially, it being founded on their own possession; in which case a general indictment lies without naming themselves ordinary, executor, or administrator. (*i*)

Of the ownership of goods of corporations and trustees.

Property vested in a body of persons ought not to be laid as the property of that body, unless such body is incorporated, but should be described as belonging to the individuals (or some of them, 7 Geo. 4. c. 64.) who constitute such body. The statute 7 Geo. 4. c. 64. s. 20., has however enacted that judgment shall not be stayed or reversed on the ground that any person or persons, mentioned in an indictment or information, is or are designated by a name of office or other descriptive appellation, instead of his, her, or their proper name or names. (*k*) This statute does not, however, apply to objections taken upon demurrer.

Where a statute gives a corporate capacity and name to individuals, and vests property in them, such property must be laid in an indictment as belonging to them, in their corporate name, and not in the names of the individual members.

In a case which occurred upon a statute 17 Geo. 3. c. 17. it was decided, that where an act of parliament gives a corporate capacity and a corporate name to any body of persons, and vests property in them, such property must be stated in the indictment to belong to them in their *corporate name*, and not in the names of the individual members. The prisoners were indicted for cutting down in the night-time trees growing on Enfield Chase; and the indictment contained two counts, the first laying the property in the trees as belonging "to Joseph Brown, George Cook, and William Sedcole, then being the churchwardens of Enfield aforesaid;" and the second laying the property as belonging "to Joseph Brown, George Cook, and William Sedcole, they the said Joseph Brown, George Cook, and William Sedcole, then being the churchwardens of the parish church of Enfield, in the county of Middlesex." It appeared that by the statute 17 Geo. 3. c. 17. (which was passed for the purpose of dividing Enfield Chase) the allotment of land from which the trees were taken, was vested in the "churchwardens of Enfield for the time being," and their successors for ever in trust, &c.; but that by a subsequent section of the statute the churchwardens were incorporated by the name of "The Churchwardens of the parish church of Enfield in the county of Middlesex." And the counsel for the prisoner submitted that the indictment was defective in laying the property in the trees as belonging to the individual members composing the corporation by their private names, instead of laying the property as belonging to the corporation by their public name. On the part of the Crown it was contended, that the private names might be expunged as surplusage.

The court held the objection to be fatal, and said, "The indictment would have been clearly right, if the first clause of the act of parliament which vests the property in the churchwardens for the time being had stood single. But the clause which gives the churchwardens a corporate capacity, and a corporate name, puts an end to the question; for where any description of men

(*h*) 1 Hale 514. 2 East. P. C. c. 16. s. 89. p. 652.

(*i*) 1 Hale 514.

(*k*) See the section more fully stated, *post.* 172.

“are directed by law to act in a corporate capacity, their natural
“and individual capacity, as to all matters respecting the subject
“of their incorporation, is totally extinct. The present indictment describes the trees to be the property of certain *individuals*,
“by their names; but the act of parliament shews the property
“to be in the *corporation*. If an action were brought in the private names of the present prosecutors, for any matter relating
“to their public capacity, they must unavoidably be non-suited;
“and, *a fortiori*, it must be erroneous in a criminal prosecution.
“But it is said that the private names may be expunged as surplusage. In the first count, supposing them expunged, the remaining description would be ‘the churchwardens of Enfield,’
“which is not the name of the corporation; and therefore that
“count would still be wrong. In the second count, it is true, the corporate name is used; but the property is not laid to be in
“the corporation of that name, it is laid to be in the private persons, and the public name is used merely as a description of
“those persons. The prisoners must therefore be discharged on
“this indictment.” (l)

But where property was vested in certain trustees, under an act of parliament, who were *not incorporated*, nor had any public name given to them collectively, it was holden that the property should have been laid in the indictment as belonging to them in their individual names. This point was decided in a case where the prisoners were indicted for stealing lead, which had been affixed to a work-house of the poor of a certain place, called the “Old Artillery Ground;” and the property was laid as belonging to “the Trustees of the poor of the Old Artillery Ground.” It appeared that by the 14 Geo. 3. c. 30., certain persons were appointed trustees of the work-house in question, and that all fixtures, furniture, &c. were vested in them; and that the act also contained this clause, “and the said trustees are hereby empowered to prefer, or order the preferring of any bill or bills of indictment against any person or persons, who shall steal, take, or carry away any, or any part of such things; and the monies and things which shall be so stolen, taken, or carried away, shall in every such indictment be laid, and deemed, and taken to be the property of the *Trustees of the Poor of the Old Artillery Ground*. And every indictment so preferred shall be held good in law, to all intents and purposes.” The question having been raised, whether the indictment had well laid the property as belonging to “the Trustees of the Poor of the Old Artillery Ground:” the court held that it had not; for as the act of parliament had not incorporated the trustees, and by that means given them collectively a *public name*, the property should have been laid as belonging to A., B., C., &c., by their proper names, and the words “*Trustees of the poor of the Old Artillery Ground*” subjoined, as a description of the capacity in which they were authorised by the legislature to act. (m)

But where property is vested in trustees not incorporated, nor having a public name given to them collectively, it should be laid in the indictment in their individual names. Sherrington's case.

The point is therefore settled, that property vested in a body of

(l) *Rex v. Patrick and Pepper*, O. B. 1783, 1 Leach 253. 2 East. (m) *Rex v. Sherrington and Bulkey*, O. B. 1789, 1 Leach 513. P. C. c. 22. s. 7. p. 1059.

persons cannot be laid as the property of that body, unless the body is incorporated; but should be described as belonging to the individuals who constitute that body, or some one of them. (n) And a recent case was decided upon this principle. By the 24 G. 3. c. 15. certain inhabitants in seven parishes were incorporated by the name of the "Guardians of the Poor" of those parishes, and it was enacted that twelve directors should be appointed out of the guardians, and the property belonging to the corporation was vested in the "directors for the time being." The prisoner was indicted for embezzling monies of the *directors*; and an objection was taken that the money should have been described as the money of the guardians by their corporate name, or as the money of the individuals who formed the body of the directors calling them by their private names as individuals. And upon a case reserved, the Judges were of that opinion, on the authority of *Rex v. Sherrington*, and held the conviction wrong. (o)

It remains to notice certain cases in which the ownership of goods, and the mode of describing property in them have been regulated by the statute 7 Geo. 4. c. 64.

7 Geo. 4. c. 64.
s. 14.
How indict-
ments for of-
fences com-
mitted on the
property of
partners may
be laid.

The fourteenth section of that statute, in order to remove the difficulty of stating the names of all the owners of property in the case of partners, and other joint owners, enacts "that in any indictment or information for any felony or misdemeanor wherein it shall be requisite to state the ownership of any property whatsoever, whether real or personal, which shall belong to or be in the possession of more than one person, whether such persons be partners in trade, joint-tenants, parceners, or tenants in common, it shall be sufficient to name one of such persons, and to state such property to belong to the person so named, and another or others, as the case may be, and whenever, in any indictment or information for any felony or misdemeanor, it shall be necessary to mention, for any purpose whatsoever, any partners, joint-tenants, parceners, or tenants in common, it shall be sufficient to describe them in the manner aforesaid; and this provision shall be construed to extend to all joint stock companies and trustees."

How property
belonging to
counties may
be laid.

The fifteenth section of the same statute, with respect to the property of counties, ridings, and divisions, enacts "that in any indictment or information for any felony or misdemeanor committed in, upon, or with respect to any bridge, court, gaol, house of correction, infirmary, asylum, or other building erected or maintained, in whole or in part, at the expence of any county, riding, or division, or on or with respect to any goods or chattels whatsoever, provided for or at the expence of any county, riding, or division, to be used for making, altering, or repairing any bridge, or any highway at the ends thereof, or any court or other such building as aforesaid, or to be used in or with any such court or other building, it shall be sufficient to state any such property, real or personal, to belong to the inhabitants of such county, riding, or division; and it shall not be necessary to specify the names of any such inhabitants."

(n) 7 Geo. 4. c. 64. s. 14.

(o) *Rex v. Beacall*, East. T. 1824,

MS. Bayley, J., and Ry. & Mood.
C. C. 15.

The sixteenth section, with respect to the property of parishes, townships, and hamlets, enacts "that in any indictment or information for any felony or misdemeanor committed upon or with respect to any work-house or poor-house, or on or with respect to any goods or chattels whatsoever, provided for the use of the poor of any parish or parishes, township or townships, hamlet or hamlets, place or places, or to be used in any work-house or poor-house, in or belonging to the same, or by the master or mistress of such work-house or poor-house, or by any workmen or servants employed therein, it shall be sufficient to state any such property to belong to the overseers of the poor for the time being of such parish or parishes, township or townships, hamlet or hamlets, place or places, and it shall not be necessary to specify the names of all or any of such overseers; (p) and in any indictment or information for any felony or misdemeanor committed on or with respect to any materials, tools, or implements provided for making, altering, or repairing any highway within any parish, township, hamlet or place, otherwise than by the trustees or commissioners of any turnpike road, it shall be sufficient to aver that any such things are the property of the surveyor or surveyors of the highways for the time being of such parish, township, hamlet or place, and it shall not be necessary to specify the name or names of any such surveyor or surveyors."

How property ordered for the use of the poor of parishes, &c. may be laid.

How materials, &c. for repairing highways, may be laid.

The seventeenth section, with respect to the property under turnpike trusts, enacts "that in any indictment or information for any felony or misdemeanor committed on or with respect to any house, building, gate, machine, lamp, board, stone, post, fence, or other thing erected or provided in pursuance of any act of parliament for making any turnpike road, or any of the conveniences or appurtenances thereunto respectively belonging, or any materials, tools, or implements provided for making, altering, or repairing any such road, it shall be sufficient to state any such property to belong to the trustees or commissioners of such road, and it shall not be necessary to specify the names of any of such trustees or commissioners."

How property of turnpike trustees may be laid.

The eighteenth section, with respect to property under commissioners of sewers, enacts "that in any indictment or in-

How in indictments for offences com-

(p) The statute 55 Geo. 3. c. 137. s. 1. vests goods, furniture, apparel, &c. provided for the use of the poor in the overseers of the parish, &c. for the time being, and their successors, and enacts that in any indictment in respect of such goods, &c. the said goods, &c. shall be laid or described to be the property of the overseers of the poor for the time being of such parish, &c. without stating or specifying their names. It was held that an indictment for stealing goods under this statute, might state them to be the goods of the overseers of the poor for the time being of the parish of A., and that this sufficiently imported

that they belonged at the time of the theft to the persons who were then the overseers. Thus, where the indictment stated that the prisoner stole weight of pork of the goods and chattels of the overseers of the poor for the time being of the parish of K. feloniously did steal, &c. and a case was reserved on the question whether this was properly laid, the Judges were of opinion, that it sufficiently imported that the goods at the time of the theft were the property of the then overseers, and therefore held the conviction right. *Rex v. Went*, East. T. 1818, *MS. Bayley, J.*, and *Russ. & Ry.* 330.

mitted on
sewers, the
property may
be laid.

“formation for any felony or misdemeanor committed on or with
“respect to any sewer or other matter within or under the view,
“cognizance, or management of any commissioners of sewers, it
“shall be sufficient to state any such property to belong to the
“commissioners of sewers within or under whose view, cogni-
“zance, or management, any such things shall be, and it shall
“not be necessary to specify the names of any of such commis-
“sioners.”

SECTION IV.

Of the Indictment, Trial, and Punishment.

Indictment.

It is not intended to enter particularly upon the form of an indictment for larceny, concerning which ample information is given in those works which treat expressly upon the subject of criminal pleading. (q) It may be briefly observed, that the prisoner must be charged with the offence in the technical form, “feloniously did steal, take, and carry away;” or, as it is said to be most proper, when cattle are the subject matter of the larceny, “feloniously did steal, take, and lead away.” (r) And though it is not now necessary that the value of the goods should be stated in order that it may appear whether the offence be grand or petit larceny, yet some value should in general be stated, as if the property be of no value it is not a subject in respect of which larceny can be committed. And it has been abundantly shewn that the property must be laid in some person who has in legal consideration a sufficient ownership for that purpose. (s)

Description of the goods.

With respect to the proper description of the goods stolen, difficulties will sometimes occur. The general rule is given, that they should be described with such a certainty as will enable the jury to decide, whether the chattel proved to have been stolen is the very same with that upon which the indictment is founded, and shew judicially to the court that it could have been the subject matter of the offence charged, and enable the defendant to plead his acquittal or conviction to a subsequent indictment relating to the same chattel. (t) And it is quite necessary that it should appear, on the face of the indictment, that the thing taken is such whereof larceny may be committed: so that, as we have seen, where the indictment was for stealing a pheasant, which *prima*

(q) Stark. Crim. Plead. 10, *et sequ.* 180, *et sequ.* 426, *et sequ.* 3 Chit. Crim. L. 944, *et sequ.* Cro. Circ. Comp. p. 246, *et sequ.*

(r) 2 Hale 184. 2 East. P. C. c. 16. s. 159. p. 778. Starkie Crim. Plead. 73, 427, 437. 3 Chit. Crim. L. 950. In Stark. Crim. Plead. 73. note (t) the

learned author says, “It has been said that for stealing a horse, it should be *cepit et abduxit*, for stealing a sheep *cepit et effugavit*; but I find no decision which warrants these unprofitable distinctions.”

(s) *Ante*, 154, *et sequ.*

(t) Stark. Crim. Plead. 181.

facie is not a subject of larceny, it was holden to be necessary to state that it was either dead, tame, or confined. (*u*)

The goods may be described as the goods of a person by the name which such person has assumed, though it be not his right name. The prisoner was indicted for stealing in the dwelling-house of Mary Johnson certain goods, her property; and it appeared in evidence that her real name was Davis, but that she had passed by the name of Johnson, without any purpose of fraud, for five years. Upon the point being saved, the Judges, (seven being present) were clear that the time she had been known by the name of Johnson warranted her being so called in the indictment. (*w*)

Name of the owner.

A set of new handkerchiefs in a piece may be described as so many handkerchiefs, though they are not separated one from another, if the pattern designates each, and they are described in the trade as so many handkerchiefs. Upon an indictment against the prisoners for stealing six handkerchiefs, it appeared that the handkerchiefs were new and in one piece, but that the pattern designated each, there being a light coloured line between each; and it also appeared that the article was known in the trade as a piece of silk handkerchiefs, and that it was the custom to charge such an article as so many handkerchiefs. The point being saved, the Judges held that the property was rightly described as six handkerchiefs, and that the conviction was right. (*x*)

Description of goods as they are known in the trade.

It is also laid down as a rule that, when the subject matter is defined by a statute, the descriptive words contained in the act should be also used in the indictment; and that where the act uses several descriptive terms, one of which, being general, includes the more specific term, an indictment would be bad which used the more general instead of the more special description, (*y*) And an instance is given where an indictment under the statutes 14 Geo. 2. c. 6., and 15 Geo. 2. c. 34. for stealing a *cow*, was holden not to be sustained by the fact that the defendant stole a *heifer*; on the ground that as those statutes mention both *heifer* and *cow*, they must be considered as having used one term in contradistinction to the other in describing the several animals they were intended to protect. (*z*)

Description of matters defined by a statute.

An indictment for stealing 10*l.* in monies numbered is not sufficient; some of the pieces of which that money consisted should be specified. Upon an indictment for breaking and entering a dwelling-house, and stealing therein 10*l.* in monies numbered, and a pair of stockings, the prisoner was found guilty of stealing the 10*l.* only; and upon the point being reserved, a majority of the Judges held the description to be insufficient and the judgment was arrested. (*a*)

Description of money.

It is said to have been formerly the practice, upon all indictments for stealing notes or other written securities to set out the

Description of written securities.

(*u*) *Ante*, 152.

Mood. C. C. 25.

(*w*) *Rex v. Norton*, East. T. 1823.
MS. Bayley, J., and Russ. & Ry. 510.

(*y*) *Stark. Crim. Plead.* 181.

(*z*) *Cooke's case*, 1 Leach 105.

(*x*) *Rex v. Nibbs and Yeams*, Trin. T. 1824. MS. Bayley, J., and Ry. &

(*a*) *Rex v. Fry*, East. T. 1822. MS. Bayley, J., and Russ. & Ry. 452.

notes or other securities at full length; (b) but it has been long settled that they may be described in a general manner, and need not be set out *verbatim*. (c) But still the indictment must follow some of the descriptions of property as given in the statute; so that where a prisoner was charged with stealing "a certain note commonly called a bank-note," of the value, &c. and convicted, an objection which was taken to this description of the note was referred to the Judges, who all held the indictment ill laid; as, in describing the property stolen to be a "*note commonly called a bank-note*," it did not follow any of the descriptions of property in the statute, and in other respects seemed inaccurate. (d)

Johnson's case.
"Divers, to wit, nine bank-notes for the payment of divers sums of money, amounting in the whole to a certain sum of money, to wit, the sum of 9*l.* of lawful money, and of the value of 9*l.* of like lawful money:" held to be a sufficient description of bank-notes, in an indictment on the embezzling act 39 Geo. 3. c. 85.

The necessary description of a bank-note underwent considerable discussion in a late case of an indictment upon the embezzling act 39 Geo. 3. c. 85. (now repealed.) The indictment charged the prisoner with embezzling "divers, to wit, nine bank-notes for the payment of divers sums of money, amounting in the whole to a certain sum of money, to wit, the sum of 9*l.* of lawful money of Great Britain, and of the value of 9*l.* of like lawful money;" and, upon error to reverse the judgment, it was objected that none of the cases had determined that such an indictment containing no description of any particular note whatever was sufficient: but the court held that this was a sufficient description. Lord Ellenborough, C. J. said, that he considered that after the statute had made bank-notes the subject of larceny, they might be described in the same manner as other things which have an intrinsic value, that is, by any description applicable to them as a chattel; that to describe them as bank-notes for the payment of money seemed to be a larger description than the statute strictly required; and that the indictment in question had set forth number, value, and species, (bank-note being the species, the value 9*l.*, and the number nine,) and thereby complied with the strict and technical rule of law. Le Blanc, J. in delivering his judgment, said, "Where a specific thing is made the subject of larceny, it is only necessary to describe it as such specific thing, it being a species of thing that is the subject of larceny. For instance, it is not necessary, in charging a larceny of sheep, to describe it either as a wether, ewe, or lamb, yet it cannot be doubted, if such an argument could prevail, that it would be of advantage to the prisoner that it should be described more particularly, because if it were, and the prosecutor, in such case, should fail to prove it to be of that particular description, the prisoner would thereupon be entitled to an acquittal. So also it may be said of bank-notes; it is not necessary to describe a bank-note particularly, as a bank-note for the payment of 1*l.*, 5*l.*, or 20*l.*, because for whatsoever sum it may be payable it is still a bank-note. In like manner, in an indictment for stealing an handkerchief, it is not necessary to describe it as a handkerchief of any specific make or materials, as that it is of silk, linen, or any other particular quality.

(b) 3 M. & S. 541.

(c) 2 East. P. C. c. 16. s. 159. p. 777. Milne's case, 2 East. P. C. c. 16. s. 37. p. 602. Johnson's case, 2 Leach 1103 note (a). Stark. Crim. Plead. 429,

note (d).

(d) Craven's case, Lancaster Sum. Ass. 1801. Mich. T. 1801. 2 East. P. C. c. 16. s. 37. p. 601, 602. Russ. & Ry. 14.

"The argument upon this part of the case has arisen from the practice that has prevailed of describing the particular sum for which the note is payable, and that the money secured thereby is unsatisfied. But the answer to such an argument is this, that whether it be payable for one sum or for another it is equally a bank-note, and a bank-note is the subject of larceny. Therefore, this is not a good objection, that the bank-note is not sufficiently set out. No further description is necessary than is required for other chattels, which are the subject of larceny; and under the general name of bank-note, the particular species, if the sum for which the note is payable can be said to constitute a species, may be proved." (e)

It was holden that where the thing stolen was described as "a bank post-bill," and was not set out, the court could not take judicial notice that it was a promissory note, or that it was such an instrument as under the statute 2 Geo. 2. c. 25. might be the subject of larceny, though it were described as made for the payment of money. (f)

It appears to have been determined, that notes, bills, &c. within the statute 2 Geo. 2. c. 25., now repealed, should be laid to be the property of A. B., and ought not to be described as *chattels*; but it was also holden, that upon an indictment which laid them to be "the property and chattels of S. S.," the word *chattels* might be rejected as surplusage. (g)

Before the statute 7 & 8 Geo. 4. c. 29. s. 5. which abolishes the distinction between grand and petty larceny, it was holden that an indictment for stealing a sheep or any other cattle must ascribe to it some value, as, unless the value exceeded 12*d.*, it would not be a capital offence. Thus, where the prisoner had been convicted of stealing a cow, a case was reserved, on the ground that no price or value was ascribed to the cow, in the indictment; and a majority of the Judges held, that though the statute in terms made the stealing any sheep, cow, &c. felony without clergy, yet it ought, in construction and by analogy to the statute which took away clergy, to be confined to what exceeded the value of 12*d.*, and therefore that a capital sentence could not be passed. (h)

An indictment for stealing a dead animal should state that it was dead; for upon a general statement that a party stole the animal, it is to be intended that he stole it alive. (i) And *à fortiori*, upon an indictment for stealing a live animal, evidence cannot be given of stealing a dead one. Thus, upon an indictment for stealing live tame turkies, if the evidence is that they were dead when stolen, the indictment will not be supported. The prisoners stole four live tame turkies in Cambridgeshire, killed them there, and

Bank Post-bill.

Bank-notes, &c. should not be described as chattels.

Cattle and other animals.

(e) *Rex v. Johnson*, 3 M. & S. 539, Judges, 2 East, P. C. c. 16. s. 37. p. 552, 553.

(f) *Rex v. Chard*, Trin. T. 1822. Russ. & Ry. 488. Bank post-bills were not in use until two years after the 2 Geo. 2. c. 25. had passed.

(g) *Rex v. Sadi and Morris*, O. B. 1787, and afterwards before all the

Judges, 2 East, P. C. c. 16. s. 37. p. 601.

(h) *Rex v. Peel*, Mich. T. 1819. MS. Bayley, J., Russ. & Ry. Cr. Cas. 407.; and *Pearles's case*, *post*.

(i) By Holroyd, J., in *Rex v. Edwards*, Hil. T. 1823. MS. Bayley, J., and Russ. & Ry. 497.

carried them dead into Hertfordshire. They were indicted in Hertfordshire for stealing four live tame turkies; and upon a case reserved, the Judges held that the word *live* in the description could not be rejected as surplusage, and that as the prisoners had not the turkies in a live state in Hertfordshire, the charge, as laid, was not proved, and that the conviction was wrong. (*k*)

Conclusion of
an indictment
on 2 Geo. 2. c.
25.

Where an indictment upon the same statute 2 Geo. 2. c. 25., now repealed, stated the offence to have been committed against the form of the statute, and not of the statutes, it was objected to, on the ground of the statute 2 Geo. 2. c. 25. having once expired, and being revived by the statute 9 Geo. 2. c. 18. It became unnecessary for the Judges to give any opinion on this objection, another point having been reserved for their consideration; but those Judges who adverted to it thought the form of the indictment good, and that the re-enacting statute was the only statute in force against the offence; (*l*) and in a subsequent case, an indictment for stealing bank-notes against the form of the statute was ruled to be good. (*m*)

An indictment for a common-law felony must contain a *contra pacem*, and so must an indictment for stealing articles, the stealing of which is made felony by statute; and laying the offence to have been against the form of the statute will not supply the defect. An indictment was for stealing bank-notes against the form of the statute, but it was not laid to be against the peace, &c. and, after conviction, the Judges held the indictment bad, and judgment was arrested. (*n*)

What defects
shall not vi-
tiate an in-
dictment after
verdict or
otherwise.

But objections of this kind will not now avail in arrest or reversal of judgment. The statute 7 Geo. 4. c. 64. s. 20. professing to have for its object that the punishment of offenders may be less frequently interrupted in consequence of technical niceties, enacts "that no judgment upon any indictment or information for any felony or misdemeanor, whether after verdict or outlawry, or by confession, default, or otherwise, shall be stayed or reversed for want of the averment of any matter unnecessary to be proved, nor for the omission of the words 'as appears by the record,' or of the words 'with force and arms,' or of the words 'against the peace,' nor for the insertion of the words 'against the form of the statute,' instead of the words 'against the form of the statutes,' or *vice versa*, nor for that any person or persons mentioned in the indictment or information, is or are designated by a name of office or other descriptive appellation instead of his, her, or their proper name or names, nor for omitting to state the time at which the offence was committed, in any case where time is not of the essence of the offence, nor for stating the time imperfectly, nor for stating the offence to have been committed on a day subsequent to the finding of the indictment

(*k*) *Rex v. Edwards and Walker*, Hil. T. 1823. Russ. & Ry. 497.

(*l*) *Phipoe's case*, 1795. 2 East. P. C. c. 16. s. 37. p. 599, 601. *Ante*, 147.

(*m*) *Morgan's case*, *cor.* Lawrence, J., *Reading Lent Ass.* 1796. 2 East. P. C. c. 16. s. 37. p. 601. Lawrence,

J., conferred with Thomson, B., on the occasion, who declared his concurrence, considering the reviving statute as in effect re-enacting the provisions of the expired law.

(*n*) *Rex v. Cook*, East. T. 1810. MS. Bayley, J., and Russ. & Ry. 176.

“ or exhibiting the information, or on an impossible day, or on a day that never happened, nor for want of a proper or perfect venue, where the court shall appear by the indictment or information to have had jurisdiction over the offence.”

The 21st section enacts “ that no judgment after verdict upon any indictment or information for any felony or misdemeanor shall be stayed or reversed for want of a similiter, nor by reason that the jury process has been awarded to a wrong officer upon an insufficient suggestion, nor for any misnomer or misdescription of the officer returning such process, or of any of the jurors, nor because any person has served upon the jury who has not been returned as a juror by the sheriff or other officer; and that where the offence charged has been created by any statute, or subjected to a greater degree of punishment, or excluded from the benefit of clergy by any statute, the indictment or information shall after verdict be held sufficient to warrant the punishment prescribed by the statute, if it describe the offence in the words of the statute.”

What shall not be sufficient to stay or reverse judgment after verdict.

It will not now be an objection to an indictment, that the matters alleged or the persons described in it, do not correspond in number or gender with the descriptions in the statute upon which it is framed. The 7 & 8 Geo. 4. c. 28. s. 14. enacts, “ that wherever this or any other statute relating to any offence, whether punishable upon indictment or summary conviction, in describing or referring to the offence or the subject matter on or with respect to which it shall be committed, or the offender, or the party affected, or intended to be affected by the offence, hath used or shall use words importing the singular number or the masculine gender only, yet the statute shall be understood to include several matters as well as one matter, and several persons as well as one person, and females as well as males, and bodies corporate as well as individuals, unless it be otherwise specially provided, or there be something in the subject or context repugnant to such construction; and wherever any forfeiture or penalty is payable to a party aggrieved, it shall be payable to a body corporate in every case where such body shall be the party aggrieved.”

7 & 8 Geo. 4. c. 28. s. 14. Rule for the interpretation of all criminal statutes.

Larceny, like every other offence, must regularly be tried in the same county or jurisdiction in which it was committed: but it should be noted with respect to larceny, that the offence is considered as committed in every county or jurisdiction into which the thief carries the goods; for the legal possession of them still remains in the true owner, and every moment's continuance of the trespass and felony amounts to a new caption and asportation. (o)

Therefore, if a man steal goods in the county of A. and carry them into the county of B., he may be indicted for the larceny in the county of B. But if a compound larceny be committed in one county, and the offender carry the property into another, though he may be convicted in the latter county of the simple larceny, he cannot be there convicted of the compound larceny. Thus where

Trial. Larceny must be tried in the proper county. But this offence is considered as committed in every county into which the thief carries the goods.

(o) 3 Inst. 113. 1 Hale 507, 508. 2 Hale 163. 1 Hawk. P. C. c. 33. s. 51. 4 Black. Com. 304. 2 East. P. C. c. 16. s. 156. p. 771.

the prisoner robbed the mail of a letter either in Wiltshire or Berkshire, and brought it into Middlesex, and was indicted capitally in Middlesex on the statutes 5 Geo. 3. c. 25. s. 7. and 7 Geo. 3. c. 40. the Judges, upon a case reserved, held that he could not be convicted capitally out of the county in which the letter was taken from the mail. (p) So robbery can only be in the county where committed; the felony travels. (q) The larceny may, however, in some respects be considered as a new larceny, and as not necessarily including all the qualities of the original larceny: therefore if the thing stolen is altered in character in the first county so as to be no longer what it was when stolen, an indictment in the second county must describe it according to its altered, and not according to its original state. An indictment was preferred in Hertfordshire for stealing four live tame turkies; and it appeared that they were stolen alive in Cambridgeshire, killed there, and carried dead into Hertfordshire; and upon the point being saved, the Judges held that though the carrying into Hertfordshire constituted a larceny in that county, yet it was a new larceny there, and a larceny of dead turkies, not of live ones. (r) But a considerable space of time intervening between the theft in one county and the carrying the stolen property into another county will not prevent the case from being considered as a larceny in the county into which the property is carried. Upon the 4th of November, the prisoner stole a note in Yorkshire, and upon the 4th of March he carried it into Durham; and he was indicted for stealing it in Durham: and upon a case reserved, the Judges were clear that the interval between the first taking and the carrying it into Durham did not prevent it from being a larceny in Durham, and that the conviction in that county was right. (s)

Barnett and others (case of.)

The four prisoners stole goods in the county of Gloucester, and divided them in that county, and then carried their shares into the county of Worcester, in their separate bags: and it was ruled that this was not a joint larceny in the county of Worcester, but separate

The following case was ruled upon the principle that the larceny in the county into which a thief carries the goods may be in some respects of a different nature from the larceny in the county in which he first took them. Four prisoners were indicted for stealing a variety of articles of hardware in the county of *Worcester*. It appeared upon the evidence that the articles in question were made up into a package at Birmingham, and dispatched by the canal from that place to Worcester, to be forwarded down the river Severn to Bristol. The package arrived safely at Worcester, where it was transferred from the canal boat to a barge called the *Blucher*, in which it was to be conveyed a great part of the way down the Severn; namely, to a place called *Brimspill* in the county of *Gloucester*. The prisoners were bargemen on board the *Blucher*; and during the voyage from Worcester to *Brimspill*, the course of which was nearly equal in the two counties of *Worcester* and *Gloucester*, being about thirty miles in each, the articles in question were stolen from the package; but they were not missed till the barge arrived at *Brimspill*. At that place the cargo was un-

(p) *Rex v. Thomson*, Hil. T. 1795. MS. Bayley, J.

(q) 1 Hale 536.

(r) *Rex v. Edwards and Walker*, Hil. T. 1823. MS. Bayley, J., and

Russ. & Ry. 497. *Ante*, 171, 2.

(s) *Rex v. Parkin*, Mich. T. 1824. MS. Bayley, J., and Ry. & Mood. C. C. 45.

loaded, and put on board another vessel, to be carried onwards to Bristol; and the *Blucher* barge returned to Worcester navigated by the prisoners. Suspicion having fallen upon them, they were apprehended in the county of *Worcester*, when their respective bags were immediately searched, and a portion of the stolen articles was found in each of them. It was then proved, that upon their apprehension, and upon being required to account for the possession of the articles, they stated that the package was broken by accident while on board the *Blucher*, on the voyage from Worcester to Brimsill, when the articles fell out, and they took them and made a division of them immediately. They did not state at what part of the voyage this transaction took place; but it appeared probable that it took place in the county of *Gloucester*, and there was no evidence to rebut that probability. Upon these facts the learned Judge ruled that the indictment could not be supported against the prisoners as for a joint larceny in the county of *Worcester*, and put the counsel for the prosecution to his election: who accordingly proceeded against one only of the prisoners, who was convicted, and sentenced to transportation. (i)

larcenies in that county, and the subject of distinct prosecutions.

But if two persons be guilty of a felonious taking in one county, and one of them alone carry the property into another county, yet if the other afterwards concur with him in the second county in securing the possession, both may be indicted in the second county. County and Donovan laid a plan to get some coats from the prosecutrix under pretence of buying them. The prosecutrix had them in Surrey at a public-house; the prisoners got her to leave them with Donovan whilst she went with County, that he might get the money to pay for them; in her absence Donovan carried them into Middlesex, and County afterwards joined him there, and concurred in securing them. The indictment was laid against both in *Middlesex*; and upon a case reserved, the Judges were unanimous that as County was present aiding and abetting in Surrey at the original larceny, his concurrence afterwards in Middlesex, though after an interval, might be connected with the original taking, and brought down his larceny to the subsequent possession in *Middlesex*. They therefore held the conviction right. (u)

It should further be observed, that there are some exceptions to the rule that a larceny is committed in every county or jurisdiction into which the thief carries the goods. For if the original taking be such whereof the common law cannot take cognizance, as if the goods be stolen at sea, the thief cannot be indicted for the larceny in any county into which he may carry them. (x)

Exceptions to the rule that a larceny is committed in every county into which the thief carries the goods.

(i) *Rex v. Barnett, Smith, Burton, and Purser, cor. Holroyd, J. Worcester Sum Ass. 1818.* Separate indictments were afterwards preferred against the three other prisoners, (as the grand jury had not been discharged,) to which they pleaded guilty. The learned counsel (Sir Wm. Owen) who was retained to defend them, inclined much to put in the

plea of *autrefois acquit* on their behalf; and only permitted them to plead guilty, on the prosecutor undertaking to recommend them strongly to mercy.

(u) *Rex v. County, East. T. 1816.* MS. Bayley, J.

(x) 3 Inst. 113. 1 Hawk. P. C. c. 33. s. 52.

Exceptions as to Scotland and Ireland.

Removed by 7 & 8 G. 4. c. 29. s. 76.

Offences committed at sea.

Offences near the boundaries of counties, or on a voyage or journey through several counties.

7 G. 4. c. 64. s. 12.

Offences committed on boundaries of counties may be tried in either county.

Offences committed during a journey or voyage may be tried in any county through which the coach, &c. passed.

A similar exception prevailed formerly where the original taking was in *Scotland* or *Ireland*. And it appears to have been holden, that a thief who had stolen goods in Scotland could not be indicted in the county of Cumberland, where he was taken with the goods. (y) But the 7 & 8 Geo. 4. c. 29. s. 76. enacts "that if any person having stolen or otherwise feloniously taken any chattel, money, valuable security, or other property whatsoever in any one part of the united kingdom, shall afterwards have the same property in his possession in any other part of the united kingdom, he may be dealt with, indicted, tried, and punished for larceny or theft in that part of the united kingdom where he shall so have such property in the same manner as if he had actually stolen or taken it in that part; and if any person in any one part of the united kingdom shall receive or have any chattel, money, valuable security, or other property whatsoever which shall have been stolen or otherwise feloniously taken in any other part of the united kingdom, such person, knowing the said property to have been stolen or otherwise feloniously taken, he may be dealt with, indicted, tried, and punished for such offence in that part of the united kingdom where he shall so receive or have the said property, in the same manner as if it had been originally stolen or taken in that part." (z)

The 78th section of the same statute enacts "that where any felony or misdemeanor punishable under this act shall be committed within the jurisdiction of the Admiralty of *England*, the same shall be dealt with, enquired of, tried, and determined in the same manner as any other felony or misdemeanor committed within that jurisdiction."

Some general provisions have also been made with respect to offences committed near the boundaries of counties, and during a journey or voyage through several counties.

The 7 Geo. 4. c. 64. s. 12., for the more effectual prosecution of offences committed near the boundaries of counties, or partly in one county and partly in another, enacts "that where any felony or misdemeanor shall be committed on the boundary or boundaries of two or more counties, or within the distance of five hundred yards of any such boundary or boundaries, or shall be begun in one county and completed in another, every such felony or misdemeanor may be dealt with, enquired of, tried, determined, and punished in any of the said counties, in the same manner as if it had been actually and wholly committed therein."

The 13th section enacts, "that where any felony or misdemeanor shall be committed on any person, or on or in respect of any property in or upon any coach, waggon, cart, or other carriage whatever employed in any journey, or shall be committed on any person, or on or in respect of any property on

(y) *Rex v. Anderson* and others, *Carlisle* Sum. Ass. 1763, and before the Judges, Nov. 1763, 2 East. P. C. c. 16. s. 156. p. 772.

(z) The statutes 45 Geo. 3. c. 92. and 54 Geo. 3. c. 186. make provision

for the more easy apprehending and bringing to trial offenders escaping from one part of the united kingdom to the other, and from one county to another.

“board any vessel whatever employed on any voyage or journey upon any navigable river, canal, or inland navigation, such felony or misdemeanor may be dealt with, inquired of, tried, determined, and punished in any county, through any part whereof such coach, waggon, cart, carriage, or vessel shall have passed, in the course of the journey or voyage during which such felony or misdemeanor shall have been committed, in the same manner as if it had been actually committed in such county; and in all cases where the side, centre, or other part of any highway, or the side, bank, centre, or other part of any such river, canal, or navigation shall constitute the boundary of any two counties, such felony or misdemeanor may be dealt with, inquired of, tried, determined, and punished in either of the said counties, through or adjoining to, or by the boundary of any part whereof such coach, waggon, cart, carriage, or vessel shall have passed, in the course of the journey or voyage during which such felony or misdemeanor shall have been committed, in the same manner as if it had been actually committed in such county.”

With regard to the evidence in cases of larceny, it generally consists, (unless the prisoner is detected in the fact,) of proof of the felony having been committed, and of the goods stolen having been found shortly afterwards in the possession of the prisoner; and upon such proof the general rule will attach, that wherever the property of one man, which has been taken from him without his knowledge or consent, is found upon another, it is incumbent on that other to prove how he came by it; otherwise the presumption is, that he obtained it feloniously. (a) This rule, founded on the necessity of the case, which cannot admit offences of this kind to go unpunished, wherever positive and direct evidence is wanting, of the guilt of the party, will probably seldom lead to a wrong conclusion if due attention be paid to the particular circumstances by which such presumption may be weakened, or entirely destroyed. (b) Amongst the most prominent of these will be the length of time which elapsed between the loss of the property and the finding of it in the possession of the prisoner; the probability of the prisoner's having been, at the time of the theft, near the place from which the property was taken; and more especially the conduct of the prisoner from first to last, with respect to the property found in his possession, and the charge brought against him of having obtained it by stealing.

Where all that can be proved concerning property found in the

Evidence.
Rule that where the stolen property is found in the possession of a person, it is incumbent on such person to prove how he came by it.

Identity of the property.

(a) 2 East. P. C. c. 16. s. 93. p. 656. Phil. on Evid. 129, 130.

(b) That it will sometimes, like every other rule of human institution, fail to guide rightly must be admitted. Lord Hale mentions a case, which he says was tried before a very learned and wary Judge, where a man was condemned and executed for horse-stealing, upon proof of his having been apprehended with the horse shortly after it was stolen; and after-

wards it came out that the real thief being closely pursued had overtaken the poor man upon the road, and asked him to walk the horse for him while he turned aside upon a necessary occasion, upon which the thief made his escape, and the man was apprehended with the horse. 2 Hale 289. And it is probable that, upon this rule, receivers of stolen goods are frequently convicted of stealing them.

possession of a supposed thief is that it is *of the same kind* as that which has been lost, this will not in general be deemed sufficient evidence of its having been feloniously obtained; and some proof of identity will be required. But where the fact is very recent, and the property consists of articles, the identity of which is not capable of strict proof, from the nature of them; the conclusion may be drawn that the property is the same, unless the prisoner can prove the contrary. (c) Thus, if a man be found coming out of another's barn, and upon his being searched, corn be found upon him, of the same kind as that in the barn, the evidence of the guilt will be pregnant: and cases have frequently occurred where persons employed in carrying sugar and other articles from ships and wharfs have been convicted of larceny, upon evidence that they were detected with property of the same kind upon them, recently upon coming from such places; although the identity of the property, as belonging to such and such persons, could no otherwise be proved. (d)

Value of the property.

Evidence that the property stolen is of some *value* will also be material, as if it be of no value, it is not a subject in respect of which larceny can be committed. (e) But property may be of value to the owner though not of general value. Thus, where the indictment was for stealing pieces of paper with available stamps thereon, and it appeared that the pieces of paper were re-issuable notes of a country bank which had been paid, and were in *transitu*, for the purpose of being re-issued, it was decided that they were the valuable property of the country bankers, (though not promissory notes within 2 Geo. 2. c. 25.) and subjects of larceny. (f)

The value must be of goods stolen at the same time.

With respect to those larcenies which are aggravated by the amount of the property stolen, as in the case of stealing in a dwelling-house to the value of 5*l.* it should appear that the property, the value of which is taken into the computation, was all stolen at the same time. For though in former times when the distinction between grand and petty larceny existed, it appears to have been the received opinion in the older books that a man stealing, at several times, several parcels of goods, each under the value of twelvepence, but amounting in the whole to more, from the same person, might have been convicted of grand larceny; (g) the severity of that rule became obsolete: and it was afterwards settled that the value of the property stolen must not only be, in the whole, of such an amount as the law required to constitute grand larceny, but that the stealing must be to that amount at one and the same particular time. For, in fact, where things are stolen at different times, there are different acts of stealing; and no number of petit larcenies would amount to a grand larceny, nor any number of grand larcenies, where it depended on the value of the property stolen, to a capital offence. (h) But it seems

(c) 2 East, P. C. c. 16. s. 93. p. 657.

(d) *Id. ibid.*

(e) *Phipoe's case, ante*, 147. Com. Dig. Ind. G. 2. Stark. Crim. Plead. 186.

(f) *Clarke's case*, 2 Leach, 1036. *Ante*, 145.

(g) See 1 Hale 531. and the authorities there cited.

(h) 1 Hawk. P. C. c. 33. s. 50, 51.

that if the property of several persons lying together in one bundle or chest, upon the same table, or even in the same house, be stolen together at one time, the value of the whole may be put together; for such stealing is one entire felony. (i)

In a case where the prisoner was indicted upon the statute of 12 Anne, c. 7. now repealed, for stealing in a dwelling-house to the amount of forty shillings, and the goods found were not proved to amount to forty shillings; the court left it to the jury to consider, upon the facts of the case, whether the prisoner had not stolen the rest of the things which the prosecutor lost, as well as those which had been produced. (k)

Goods not produced.

A prisoner indicted for larceny cannot be convicted merely of a trespass: for though larceny, as has been before stated, includes a trespass, yet if, upon an indictment, the taking appear not to be felonious, though amounting to a trespass, the defendant is entitled to a general acquittal. (l)

Verdict.

By the 7 & 8 Geo. 4. c. 28. it is enacted, "that where any person shall be indicted of treason or felony, the jury empanelled to try such person shall not be charged to enquire concerning his lands, tenements, or goods, nor whether he fled for such treason or felony."

Jury not to enquire of the prisoner's lands &c. nor whether he fled.

For the punishment of simple larceny, the 7 & 8 Geo. 4. c. 29. s. 3. enacts, "that every person convicted of simple larceny, or of any felony hereby made punishable like simple larceny, shall, (except in the cases hereinafter otherwise provided for,) be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years; and, if a male, to be once, twice, or thrice publicly or privately whipped, (if the court shall so think fit), in addition to such imprisonment."

Punishment for simple larceny.

The fourth section enacts, "that where any person shall be convicted of any felony or misdemeanor punishable under this act, for which imprisonment may be awarded, it shall be lawful for the court to sentence the offender to be imprisoned, or to be imprisoned and kept to hard labour, in the common gaol or house of correction, and also to direct that the offenders shall be kept in solitary confinement for the whole or any portion or portions of such imprisonment, or of such imprisonment with hard labour, as to the court in its discretion shall seem meet."

The court may for all offences within this act order hard labour or solitary confinement.

The sixty-first section of the same statute enacts, "that in the case of every felony punishable under this act, every principal in the second degree, and every accessory before the fact shall be punishable with death or otherwise, in the same manner as the principal in the first degree is by this act punishable; and every accessory after the fact to any felony punishable under this act, (except only a receiver of stolen property) shall, on convic-

Principals in the second degree, and accessories.

2 East, P. C. c. 16. s. 136. p. 740. Petrie's case, 1 Leach 294, ante, 53. Farley's case, cor. Ashhurst, J., *Surrey* Leat Ass. 1786. 2 East. P. C. *ibid.*

(i) 1 Hale 531. 2 East. P. C. c. 16. s. 136. p. 740, 741.

(k) Hamilton's case, 1 Leach 351.

ante, 53. The jury found the prisoner guilty of stealing to the value of forty shillings.

(l) Staundf. 24 b. Kel. 29. Scofield's case, Cald. 401. 2 East. P. C. c. 16. s. 134. p. 736., and s. 159. p. 778.

Abettors in misdemeanors.

"tion, be liable to be imprisoned for any term not exceeding two years; and every person, who shall aid, abet, counsel, or procure the commission of any misdemeanor punishable under this act shall be liable to be indicted and punished as a principal offender."

Attainder of another crime not pleadable.

The 7 & 8 Geo. 4. c. 28. s. 4. enacts, "that no plea setting forth any attainder shall be pleaded in bar of any indictment, unless the attainder be for the same offence as that charged in the indictment."

If a person under sentence for another crime is convicted of felony, the court may pass a second sentence, to commence after the expiration of the first.

The tenth section enacts, "that wherever sentence shall be passed for felony on a person already imprisoned under sentence for another crime, it shall be lawful for the court to award imprisonment for the subsequent offence, to commence at the expiration of the imprisonment to which such person shall have been previously sentenced; and where such person shall be already under sentence, either of imprisonment or of transportation the court, if empowered to pass sentence of transportation, may award such sentence for the subsequent offence, to commence at the expiration of the imprisonment or transportation to which such person shall have been previously sentenced, although the aggregate term of imprisonment or transportation respectively may exceed the term for which either of those punishments could be otherwise awarded."

Punishment for a subsequent felony.

The 11th section of the same statute reciting that it was expedient to provide for the more exemplary punishment of offenders who commit felony after a previous conviction for felony, whether such conviction shall have taken place before or after the commencement of this act, enacts, "that if any person shall be convicted of any felony, not punishable with death, committed after a previous conviction for felony, such person shall, on such subsequent conviction, be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit) in addition to such imprisonment; and in an indictment for any such felony committed after a previous conviction for felony, it shall be sufficient to state that the offender was, at a certain time and place, convicted of felony, without otherwise describing the previous felony; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for the previous felony, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court where the offender was first convicted, or by the deputy of such clerk or officer, (for which certificate a fee of six shillings and eight-pence and no more shall be demanded or taken) shall, upon proof of the identity of the person of the offender be sufficient evidence of the first conviction, without proof of the signature or official character of the person appearing to have signed the same."

Form of indictment for a subsequent felony.

Evidence of first conviction.

Restitution of stolen property to the prosecutor.

The 57th section of the 7 & 8 Geo. 4. c. 29. for the purpose of encouraging the prosecution of offenders, enacts, "that if any person guilty of any such felony or misdemeanor as aforesaid, in stealing,

“ taking, obtaining, or converting, or in knowingly receiving any chattel, money, valuable security, or other property whatsoever, shall be indicted for any such offence, by or on the behalf of the owner of the property, or his executor or administrator, and convicted thereof, in such case the property shall be restored to the owner or his representative; and the court, before whom any such person shall be so convicted, shall have power to award, from time to time, writs of restitution for the said property, or to order the restitution thereof in a summary manner: Provided always, that if it shall appear, before any award or order made, that any valuable security shall have been *bond fide* paid or discharged by some person or body corporate liable to the payment thereof; or, being a negotiable instrument, shall have been *bond fide* taken or received by transfer or delivery, by some person or body corporate for a just and valuable consideration, without any notice, or without any reasonable cause to suspect that the same had by any felony or misdemeanor been stolen, taken, obtained, or converted as aforesaid, in such case the court shall not award or order the restitution of such security.”

Except in certain cases.

CHAPTER THE TENTH.

OF STEALING FROM THE PERSON.

7 & 8 Geo. 4.
c. 29. s. 6.

WITH respect to such stealing from the person as does not amount to robbery, the statute 7 & 8 Geo. 4. c. 29. s. 6. enacts "that if any person shall steal any chattel, money, or valuable security from the person of another, or shall assault any other person with intent to rob him, or shall, with menaces or by force demand any such property of any other person with intent to steal the same, every such offender shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years; and if a male to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit,) in addition to such imprisonment." (a)

Repealed stat.
48 Geo. 3. c.
129. s. 2.

By the repealed statute 48 Geo. 3. c. 129. s. 2. it was enacted, "that any person who should feloniously steal, take, and carry away any money, goods, or chattels, from the person of any other, whether privily without his knowledge, or not, but without such force, or putting in fear, as is sufficient to constitute the crime of robbery, should be liable to the punishments therein mentioned." In a case upon this repealed statute it was holden that the indictment need not negative the force or fear necessary to constitute robbery, and that, though it should appear upon the evidence that there was such force or fear, the punishment imposed by that statute might be inflicted. The prisoner was indicted for stealing from the person: the indictment did not state that there was no such force or fear as is necessary to constitute robbery; and it appeared in evidence that such force and fear existed. Lord Ellenborough, before whom the prisoner was tried, saved the point whether he could go beyond the common law punishment; and, upon conference, all the Judges held that he might; and that, where force or fear were not charged in the indictment, the existence of force or fear would not exempt the party from the statutable punishment; and as all that the indictment charged was proved, the proving what made the offence greater would not entitle the prisoner to a smaller punishment. (b)

Held that the indictment upon the repealed statute 48 Geo. 3. c. 129. need not negative force or fear, and that the existence of force or fear was no answer to the charge.

(a) This offence was once capital by the 8 Eliz. c. 4. s. 1 & 2.

(b) *Rex v. Pearce*, East. T. 1810. MS. Bayley, J., and Russ. & Ry. 174.

A more recent case upon the same repealed statute was to the same effect. The indictment was for stealing from the person, and it did not negative force or fear; and, upon the evidence, the facts amounted to a clear case of highway robbery. The learned Judge, before whom the prisoner was tried, doubted whether he ought not to direct an acquittal, and detain the prisoner to be indicted for the robbery; but he let the trial proceed, and, on conviction, sentenced the prisoner to transportation for life: but he made a case upon the questions, first, Whether the indictment should not have negatived force and fear; secondly, Whether the existence of force and fear was not an answer to the charge as laid; and, thirdly, Whether the statutable punishment could be inflicted: And the Judges were unanimous that the indictment need not, and ought not to negative force or fear, that the existence of such force or fear was no answer to the charge, and that the statutable punishment was rightly inflicted. (c)

To constitute a stealing from the person, the thing taken must be completely removed from the person. In a case where, upon the evidence of the prosecutor, it appeared that his pocket book was drawn from his waistcoat pocket an inch above the top of the pocket, but was returned immediately again into the pocket, probably by the quick motion of the prosecutor's arm upon the hand and arm of the thief, with whom and his accomplices the prosecutor had a severe struggle before he was secured, it was held by a majority of the Judges, that the prisoner was not rightly convicted of stealing from the person, because from first to last the book remained about the person of the prosecutor. But the Judges all agreed that the simple larceny was complete, and sentence of transportation for life having been passed, a pardon, on condition of transportation for seven years, was recommended. (d)

The thing stolen must be completely removed from the person.

Principals in the second degree, and accessories before the fact, are punishable in the same manner as principals in the first degree: and accessories after the fact, (except receivers) are liable to be imprisoned for any term not exceeding two years. (e)

Principals in the second degree, and accessories.

(c) *Rex v. Robinson*, cor. Wood, B., and considered by the Judges, Hil. T. 1817. MS. Bayley, J., and Russ. & Ry. 321.

(d) *Rex v. Thompson*, Hil. T. 1825,

Ry. & Mood. C. C. 78.

(e) 7 & 8 Geo. 4. c. 29. s. 61. As to the proceedings for the trial of accessories, see 7 Geo. 4. c. 64. s. 9, 10, 11. *Addenda* to the first volume.

CHAPTER THE ELEVENTH.

OF STEALING HORSES, COWS, SHEEP, &c.

WE have already seen that larceny may be committed of such domestic creatures as are fit for food; (a) and it remains only to notice in this place the statutable provision which, for the better protection of some of the more valuable domestic animals, makes persons, found guilty of stealing them, liable to capital punishment.

7 & 8 Geo. 4.
c. 29. s. 25.

The statute 7 & 8 Geo. 4. c. 29. s. 25. enacts "that if any person shall steal any horse, mare, gelding, colt, or filly, or any bull, cow, ox, heifer, or calf, or any ram, ewe, sheep, or lamb, or shall wilfully kill any of such cattle with intent to steal the carcase, or skin, or any part of the cattle so killed, every such offender shall be guilty of felony, and being convicted thereof shall suffer death as a felon."

Principals in
the second de-
gree and ac-
cessories.

Principals in the second degree, and accessories before the fact, are punishable in the same manner as principals in the first degree: and accessories after the fact, (except receivers) are liable to be imprisoned for any term not exceeding two years. (b)

Points relating
to horse-steal-
ing arise as in
larcenies of
other prop-
erty.

The various points upon the definition of larceny, which have been considered in the chapter treating generally of that offence, (c) relate as well to the stealing of horses as of other property; and we may remember a case of considerable nicety, where, upon a finding by the jury that the prisoners took some horses, merely with intent to ride, and afterwards to leave them, and not to return, or make any further use of them, it was holden that such taking amounted to a trespass only, and not to larceny. (d)

Rawlins's case.
The prisoner
was indicted
for stealing
lambs, and the
evidence was
that the car-
cases were
found in the

The doctrine that any the least removal of the thing feloniously taken, will constitute larceny, (e) applies to the stealing of sheep, though part of the animal only be taken. In a case where the prisoner was indicted for stealing six lambs, without any count for killing with intent to steal the carcase or any part thereof, the evidence was that the carcasses of the lambs, without their skins, were found upon the premises where they had been kept, and that

(a) *Ante*, p. 150.

(b) 7 & 8 Geo. 4. c. 29. s. 61. As to the proceedings in respect to accessories, see 7 Geo. 4. c. 64. s. 9, 10, 11. *Addenda* to the first volume.

(c) *Ante*, 92. *et sequ.*

(d) *Rex v. Phillips and Strong*, *Ante*, 97.

(e) *Ante*, 95.

the prisoner had sold the skins on the morning after the offence was committed, upon which the jury were directed to find the prisoner guilty, on the ground that the lambs must have been *removed from the fold*. But a doubt having occurred whether, as the statute 14 Geo. 2. c. 6., now repealed, specified feloniously driving away, and feloniously killing with intent to steal the whole or any part of the carcase, as well as feloniously stealing in general, (although there must, in such cases, be some removal of the thing,) it did not intend to make these different offences; the case was submitted to the consideration of the Judges, who held the conviction right; as any removal of the thing feloniously taken constitutes larceny. (f)

ground of the owner, and the skins only taken away: and a conviction upon this evidence was holden good.

It was decided upon the repealed statute 14 Geo. 2. c. 6. that cutting off part of a sheep whilst it was alive with intent to steal such part would support an indictment for killing with intent to steal, if the cutting off must occasion the death of the animal, especially if the offender hid the part cut off, and meant to fetch it away at a future time. The indictment was for killing a lamb with intent to steal part of the carcase; and it appeared that the prisoner cut off a leg from the animal whilst it was alive, and carried it away before the animal died; but that the cutting necessarily caused the death of the animal. The learned Judge before whom the prisoner was tried thought the giving the death wound before the larceny sufficient, and that the animal might be considered as killed by relation from that time, or if not, that the intention to fetch away the leg was an intent to continue the larceny thereof, but he saved the point for the opinion of the Judges, who were unanimous, principally upon the first point, that the conviction was right. (g)

In a case where the prisoner was indicted for stealing a *cow*, it appeared, upon the evidence, that the animal stolen was a female beast only two years and a half old that had never had a calf; and that a female beast of the cow kind, how old soever, if she have never had a calf, is always called a *heifer*. An objection was therefore taken, by the counsel for the prisoner, that the charge in the indictment was not supported by the evidence; and, the prisoner being found guilty, the question was referred to the consideration of the twelve Judges, who were of opinion, that as the statute 15 Geo. 2. c. 34., now repealed, mentioned both *heifer* and *cow*, it must be considered as using one term in contradistinction to the other, in describing the several animals intended to be protected; and that, as the beast stolen was not therefore such as was described in the indictment, the prisoner was entitled to an acquittal. (h)

Cook's case. An indictment for stealing a cow held not to be supported by evidence of stealing a heifer.

As the statute 26 Geo. 3. c. 71., was passed in order to remedy (according to the recital of the act) the facilities afforded to the stealing of cattle by persons of low condition, who kept houses

26 Geo. 3. c. 71. as to slaughtering cattle.

(f) Rawlins's case, *Sarum* Sum. Ass. 1800, and Mich. T. 1800. 2 East. P. C. c. 16. s. 48. p. 617.

(g) Rex v. Clay. The prisoner was tried before Bayley, J., and the point was considered by the Judges (eleven being present) in East. T. 1819. MS. Bayley, J., and Russ. & Ry. 387.

(h) Cook's case, *Warwick* Lent Ass. 1774, and Serjeant's Inn Hall, 1774. 1 Leach 105. 2 East. P. C. c. 16. s. 48. p. 616.

Slaughtering
cattle without
a licence, or
giving proper
notice, &c.
made felony.

Destroying or
burying hides,
misdemeanor.

Exceptions.

or places for the purpose of slaughtering horses and other cattle, its provisions may be shortly mentioned in this place. It contains many enactments for the regulation of slaughter-houses; requires persons keeping them to take out a licence, and to give notice, previous to the slaughtering and flaying of any cattle, to an inspector appointed as mentioned in the act; and to kill and flay the cattle only within certain hours. The eighth section enacts that if any person keeping or using any slaughtering-house or place mentioned in the act, shall slaughter any cattle for any other purpose than for butcher's meat, or shall flay any cattle brought dead to such slaughtering-house or other place without a licence, or without giving notice, or shall slaughter or flay at any time except within the hours limited by the act, or shall not delay slaughtering or killing according to the direction of the inspector properly authorized, such person so offending in either of these cases and being convicted shall be adjudged and taken to be guilty of felony, and shall be punished by fine and imprisonment and such corporal punishment by public or private whipping, or shall be transported for any time not exceeding seven years, as the court before whom the offender shall be tried and convicted, shall direct. (i) The ninth section enacts, that persons keeping or using such slaughtering-house or place, and throwing into lime, or rubbing therewith, or with any other corrosive matter, or destroying, or burying hides of cattle slaughtered or flayed by them, shall be guilty of a misdemeanor, punishable by fine, imprisonment, and whipping. The statute also creates other offences of a smaller degree, and imposes penalties recoverable by summary proceedings before justices of the peace. (k) The fourteenth section provides, that the act shall not extend to any currier, felt-maker, tanner, or dealer in hides, who shall kill any distempered or aged cattle or purchase any dead cattle for the *bond fide* purpose of selling, using or curing the hides thereof, in the course of their respective trades; nor to any farrier employed to kill aged and distempered cattle; nor to any person who shall kill any of their own or other cattle, or purchasing any dead horse or other cattle, to feed their own hounds or dogs, or giving away the flesh for the like purpose. But it is further enacted, that if any collar-maker, currier, &c. or other person shall, under colour of their trades, knowingly or willingly kill any sound or useful horse, gelding, mare, foal, or filley, or boil or otherwise cure the flesh thereof, for the purpose of selling it, such person shall be deemed an offender within the meaning of the act, and for every offence, forfeit any sum not exceeding twenty, nor less than ten pounds. (l)

(i) See a precedent of an indictment against the keeper of a slaughter-house, for slaughtering a horse without giving the proper notice, 3 Chit.

Crim. L. 791.

(k) See the statute, and 2 Burn. Just. *Horses*, sect. IV.

(l) 26 Geo. 3. c. 71. s. 15.

CHAPTER THE TWELFTH.

OF STEALING AND DESTROYING DEER.

THE former statutes upon this subject are repealed by the 7 & 8 Geo. 4. c. 27.

The 7 & 8 Geo. 4. c. 29. s. 26. enacts "that if any person shall unlawfully and wilfully course, hunt, snare, or carry away, or kill, or wound, or attempt to kill or wound, any deer kept or being in the inclosed part of any forest, chase, or purlieu, or in any inclosed land wherein deer shall be usually kept, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable to be punished in the same manner as in the case of simple larceny; and if any person shall unlawfully and wilfully course, hunt, snare, or carry away, or kill, or wound, or attempt to kill or wound, any deer kept or being in the uninclosed part of any forest, chase, or purlieu, he shall for every such offence, on conviction thereof before a justice of the peace, forfeit and pay such sum, not exceeding fifty pounds, as to the justice shall seem meet; and if any person, who shall have been previously convicted of any offence relating to deer, for which a pecuniary penalty is by this act imposed, shall offend a second time, by committing any of the offences hereinbefore last enumerated, such second offence, whether it be of the same description as the first offence or not, shall be deemed felony, and such offender, being convicted thereof, shall be liable to be punished in the same manner as in the case of simple larceny."

The 27th section enacts, "that if any deer, or the head, skin, or other part thereof, or any snare or engine for the taking of deer, shall by virtue of a search warrant, to be granted as hereinafter mentioned, be found in the possession of any person, or on the premises of any person, with his knowledge, and such person, being carried before a justice of the peace, shall not satisfy the justice that he came lawfully by such deer, or the head, skin, or other part thereof, or had a lawful occasion for such snare or engine, and did not keep the same for any unlawful purpose, he shall, on conviction by the justice, forfeit and pay any sum not exceeding twenty pounds; and if any such person shall not, under the provisions aforesaid, be liable to conviction, then for the discovery of the party who actually killed or stole such deer, it shall be lawful for the justice, at his discretion, as the evidence given, and the circumstances of the case shall require,

7 & Geo. 4.
c. 29. s. 26.
Stealing, &c.
deer in any in-
closed ground,
felony.

The like in
certain unin-
closed ground
punishable
summarily.

Deer-stealing,
in uninclosed
ground after
any other of-
fence as to
deer, felony.

S. 27. Sus-
pected per-
sons, found in
possession of
venison, &c.
and not satis-
factorily ac-
counting for it.

In case they
cannot be con-
victed, how
the justice
may proceed.

“to summon before him every person through whose hands such deer, or the head, skin, or other part thereof, shall appear to have passed: and if the person from whom the same shall have been first received, or who shall have had possession thereof, shall not satisfy the justice that he came lawfully by the same, he shall, on conviction by the justice, be liable to the payment of such sum of money as is hereinbefore last mentioned.”

S. 28. Setting engines for taking deer, or pulling down park fences.

The 28th section of the same statute enacts, “that if any person shall unlawfully and wilfully set or use any snare or engine whatsoever, for the purpose of taking or killing deer, in any part of any forest, chase, or purlieu, whether such part be inclosed or not, or in any fence or bank dividing the same from any land adjoining, or in any inclosed land where deer shall be usually kept, or shall unlawfully and wilfully destroy any part of the fence of any land where any deer shall be then kept, every such offender, being convicted thereof before a justice of the peace, shall forfeit and pay such sum of money, not exceeding twenty pounds, as to the justice shall seem meet.”

S. 29. Deer-keepers may seize the guns, &c. of offenders who, on demand, do not deliver up the same.

The 29th section of the same statute enacts, “that if any person shall enter into any forest, chase, or purlieu, whether inclosed or not, or into any inclosed land where deer shall be usually kept, with intent unlawfully to hunt, course, wound, kill, snare, or carry away any deer, it shall be lawful for every person intrusted with the care of such deer, and for any of his assistants, whether in his presence or not, to demand from every such offender any gun, fire-arms, snare, or engine in his possession, and any dog there brought for hunting, coursing, or killing deer, and in case such offender shall not immediately deliver up the same, to seize and take the same from him in any of those respective places, or, upon pursuit made, in any other place to which he may have escaped therefrom, for the use of the owner of the deer; and if any such offender shall unlawfully beat or wound any person intrusted with the care of the deer, or any of his assistants, in the execution of any of the powers given by this act, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable to be punished in the same manner as in the case of simple larceny.”

Resistance to keepers, &c. in the execution of their duty.

The 63rd section contains a general provision for the apprehension and discovery of offenders punishable under this act, and the 64th and following sections regulate the proceedings in respect of a summary conviction.

Apprehension of offenders. Summary convictions.

Principals and accessories.

By the 61st section, in cases of felony, principals in the second degree, and accessories before the fact, are punishable in the same manner as principals in the first degree; and accessories after the fact, (except receivers) are, on conviction, liable to be imprisoned for any term not exceeding two years; and abettors in misdemeanors are liable to be indicted and punished as principal offenders. By section 62, abettors in offences punishable on summary conviction, are made punishable as principal offenders.

Abettors in misdemeanors and in minor offences.

CHAPTER THE THIRTEENTH.

OF TAKING OR KILLING HARES OR CONIES IN A WARREN, &c.

THE statutes formerly existing upon this subject are repealed by 7 & 8 Geo. 4. c. 27.

The statute 7 & 8 Geo. 4. c. 29. s. 30. enacts "that if any person shall unlawfully and wilfully in the night-time take or kill any hare or coney in any warren or ground lawfully used for the breeding or keeping of hares or conies, whether the same be inclosed or not, every such offender shall be guilty of a misdemeanor, and being convicted thereof shall be punished accordingly; and, if any person shall unlawfully and wilfully in the day-time, take or kill any hare or coney in any such warren or ground, or shall at any time set or use therein any snare or engine for the taking of hares or conies, every such offender, being convicted thereof before a justice of the peace, shall forfeit and pay such a sum of money not exceeding five pounds, as to the justice shall seem meet: provided always that nothing herein contained shall affect any person taking or killing in the day-time any conies on any sea-bank or river-bank in the county of *Lincoln*, so far as the tide shall extend, or within one furlong of such bank."

7 & 8 Geo. 4. c. 29. s. 30. Killing hares or conies in a warren, &c. in the night, or in the day-time.

Proviso.

With respect to what shall be deemed a *taking* of a hare, &c. it may be observed, that in a case upon the repealed statute, 5 Geo. 3. c. 14. in which the prisoner was indicted for entering a warren in the night-time, and there *taking* a coney against the will of the occupier of the warren, it appeared in evidence that he set wires in the warren at about six o'clock in the evening of a day towards the latter end of December; that a coney was caught in one of the wires; and that he came again before six o'clock the next morning, when he was surprised and seized by the warrener just as he was about laying hold of the wire in which the coney was caught; the coney being then alive: and upon a case reserved, the Judges thought that the taking by the wire was a taking by the prisoner within the meaning of the statute, and that he had been properly convicted. (a).

Glover's case. *Taking* a coney in a wire held sufficient to constitute the offence, though the animal was not killed, and the party did not take it away.

(a) Glover's case, *cor.* Bayley, J., *Somerset Spr. Ass.* 1814, and *East. T.* 1814, *MS. Bayley, J., and Russ. & Ry.* 269.

Apprehension,
&c. of offenders, and proceedings in summary convictions.

Abettors.

The 63rd section contains a general provision for the apprehension and discovery of offenders punishable under the act, and the 64th and following sections regulate the proceedings in respect of summary convictions.

By the 61st section abettors in misdemeanors are liable to be indicted and punished as principal offenders: and by the 62nd section abettors in offences punishable on summary convictions are made punishable as principal offenders.

CHAPTER THE FOURTEENTH.

OF UNLAWFULLY TAKING OR ATTEMPTING TO TAKE FISH.

It is admitted, that larceny at common law may be committed of fish when confined in a trunk or net; (a) but doubts have been raised, whether it may be committed in like manner of fish in a pond. It should seem, however, upon principle, and according to the better opinions, that larceny may be committed of fish in a pond, if the pond be private enclosed property, and of such kind and dimensions that the fish within it may be considered as restrained of their natural liberty, and liable to be taken at any time, according to the pleasure of the owner. (b) But clearly larceny at common law cannot be committed of fish at their natural liberty in rivers or great waters. (c)

Offence at
common law.

Many statutes were passed at different times for the better preservation of fish, and for regulating the fisheries in various parts of the kingdom; but some of them became obsolete, and the others were repealed by the 7 & 8 Geo. 4. c. 27.

Offences by
statutes.

The 7 & 8 Geo. 4. c. 29. s. 34. enacts, "that if any person shall unlawfully and wilfully take or destroy any fish in any water which shall run through or be in any land adjoining or belonging to the dwelling-house of any person, being the owner of such water, or having a right of fishery therein, every such offender shall be guilty of a misdemeanor, and, being convicted thereof, shall be punished accordingly; and if any person shall unlawfully and wilfully take or destroy, or attempt to take or destroy, any fish in any water, not being such as aforesaid, but which shall be private property, or in which there shall be any private right of fishery, every such offender, being convicted thereof before a justice of the peace, shall forfeit and pay, over and above the value of the fish taken or destroyed, (if any), such sum of money, not exceeding five pounds, as to the justice shall seem meet: provided always, that nothing hereinbefore contained shall extend to any person angling in the day-time; but if any person shall by angling in the day-time unlawfully and wilfully

Taking fish in
any water
situate in
land belong-
ing to a dwell-
ing house.

In any private
fishery else-
where.

Provisions
respecting
anglers.

(a) *Ante*, 151. 2 East. P. C. c. 16. s. 43. p. 610.

(b) *Staundf.* 25 b. 3 Inst. 109. *Lamb.* 274. 1 Hawk. P. C. c. 33. s. 39. 2 East. P. C. c. 16. s. 43. p. 610, 611. But the indictment should

describe the pond, so that it may appear on the face of it, that taking fish out of such a pond is felony, 2 East. P. C. 611.

(c) 3 Inst. 109. 1 Hawk. P. C. c. 33. s. 39.

"take or destroy, or attempt to take or destroy, any fish in any such water as first mentioned, he shall, on conviction before a justice of the peace, forfeit and pay any sum not exceeding five pounds; and if in any such water as last mentioned, he shall, on the like conviction, forfeit and pay any sum, not exceeding two pounds, as to the justice shall seem meet; and if the boundary of any parish, township, or vill, shall happen to be in or by the side of any such water as is hereinbefore mentioned, it shall be sufficient to prove that the offence was committed either in the parish, township, or vill, named in the indictment or information, or in any parish, township, or vill adjoining thereto."

The tackle of fishers may be seized.

The 35th section of the same statute enacts, "that if any person shall at any time be found fishing against the provisions of this act, it shall be lawful for the owner of the ground, water, or fishery, where such offender shall be so found, his servants, or any person authorized by him, to demand from such offender any rods, lines, hooks, nets, or other implements for taking or destroying fish, which shall then be in his possession, and in case such offender shall not immediately deliver up the same, to seize and take the same from him for the use of such owner: provided always, that any person angling in the day-time against the provisions of this act, from whom any implements used by anglers shall be taken, or by whom the same shall be delivered up as aforesaid, shall by the taking or delivering thereof be exempted from the payment of any damages or penalty for such angling."

Angler, on seizure of his tackle, exempt from penalty.

Stealing oysters or oyster brood from oyster beds.

The 36th section of the same statute enacts, "that if any person shall steal any oysters or oyster brood from any oyster bed, laying or fishery, being the property of any other person, and sufficiently marked out or known as such, every such offender shall be deemed guilty of larceny, and, being convicted thereof, shall be punished accordingly; and if any person shall unlawfully and wilfully use any dredge, or any net, instrument, or engine whatsoever, within the limits of any such oyster fishery, for the purpose of taking oysters or oyster brood, although none shall be actually taken; or shall, with any net, instrument, or engine drag upon the ground or soil of any such fishery, every such person shall be deemed guilty of a misdemeanor, and, being convicted thereof, shall be punished by fine or imprisonment, or both, as the court shall award; such fine not to exceed twenty pounds, and such imprisonment not to exceed three calendar months; and it shall be sufficient in any indictment or information to describe, either by name or otherwise, the bed, laying, or fishery in which any of the said offences shall have been committed, without stating the same to be in any particular parish, township, or vill: provided always, that nothing herein contained shall prevent any person from catching or fishing for any floating fish within the limits of any oyster fishery with any net, instrument, or engine adapted for taking floating fish only."

Dredging for oysters within the limits of any oyster fishery.

Proviso.

Apprehension of offenders. Summary convictions.

The 63d section contains a general provision for the apprehension of offenders punishable under the act, except only as to the offence of angling in the day-time: and the 64th and following

sections regulate the proceedings in respect of summary convictions.

The 61st section as to cases of felony, makes principals in the second degree and accessories before the fact punishable in the same manner as principals in the first degree; and accessories after the fact (except receivers) are on conviction liable to be imprisoned for any term not exceeding two years; and abettors in misdemeanors are liable to be indicted and punished as principal offenders. By section 62, abettors in offences punishable on summary conviction are made punishable as principal offenders.

Principals in the second degree and accessories.

CHAPTER THE FIFTEENTH.

OF STEALING IN ANY VESSEL IN PORT, OR UPON ANY NAVIGABLE RIVER, &c. OR IN ANY CREEK, &c. AND OF PLUNDERING SHIPWRECKED VESSELS.

Stealing goods from a vessel in a port, river, canal, &c.

THE 7 & 8 Geo. 4. c. 29. s. 17. enacts, "that if any person shall steal any goods or merchandize in any vessel, barge, or boat of any description whatsoever, in any port of entry or discharge, or upon any navigable river or canal, or in any creek belonging to or communicating with any such port, river, or canal, or shall steal any goods or merchandize from any dock, wharf, or quay adjacent to any such port, river, canal, or creek, every such offender, being convicted thereof, shall be liable to any of the punishments which the court may award as hereinbefore last mentioned," namely, "shall be liable at the discretion of the court to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, and if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall think fit) in addition to such imprisonment."

Plundering any part of the tackle or cargo of a shipwrecked vessel.

Proviso.

The 18th section of the same statute enacts "that if any person shall plunder or steal any part of any ship or vessel which shall be in distress, or wrecked, stranded, or cast on shore, or any goods, merchandize, or articles of any kind belonging to such ship or vessel, every such offender, being convicted thereof, shall suffer death as a felon: provided always, that when articles of small value shall be stranded or cast on shore, and shall be stolen without circumstances of cruelty, outrage, or violence, it shall be lawful to prosecute and punish the offender as for simple larceny; and in either case the offender may be indicted and tried either in the county in which the offence shall have been committed, or in any county next adjoining."

Place of trial.

Persons in possession of shipwrecked goods not giving a satisfactory account.

The 19th section enacts, "that if any goods, merchandize, or articles of any kind, belonging to any ship, or vessel in distress, or wrecked, stranded, or cast on shore as aforesaid, shall, by virtue of a search-warrant, to be granted as hereinafter mentioned, be found in the possession of any person, or on the premises of any person with his knowledge, and such person, being carried before a justice of the peace, shall not satisfy the justice that he came lawfully by the same, then the same shall, by or-

“der of the justice, be forthwith delivered over to or for the use
 “of the rightful owner thereof; and the offender, on conviction
 “of such offence before the justice, shall forfeit and pay, over and
 “above the value of the goods, merchandize, or articles, such
 “sum of money, not exceeding twenty pounds, as to the justice
 “shall seem meet.”

The 20th section of the same statute enacts, “that if any person
 “shall offer or expose for sale any goods, merchandize, or articles
 “whatsoever, which shall have been unlawfully taken, or reason-
 “ably suspected so to have been, from any ship or vessel in dis-
 “tress, or wrecked, stranded, or cast on shore as aforesaid, in
 “every such case any person to whom the same shall be offered
 “for sale, or any officer of the customs or excise, or peace officer,
 “may lawfully seize the same, and shall with all convenient speed
 “carry the same, or give notice of such seizure, to some justice
 “of the peace; and if the person who shall have offered or exposed
 “the same for sale, being duly summoned by such justice, shall
 “not appear and satisfy the justice that he came lawfully by such
 “goods, merchandize, or articles, then the same shall, by order
 “of the justice, be forthwith delivered over to or for the use of
 “the rightful owner thereof, upon payment of a reasonable re-
 “ward (to be ascertained by the justice) to the person who seized
 “the same; and the offender, on conviction of such offence by the
 “justice, shall forfeit and pay, over and above the value of
 “the goods, merchandize, or articles, such sum of money,
 “not exceeding twenty pounds, as to the justice shall seem
 “meet.”

If any person
 offers ship-
 wrecked goods
 for sale, the
 goods may be
 seized, &c.

The 63d section contains a general provision for the apprehen-
 sion and discovery of offenders punishable under the act: and the
 64th and following sections regulate the proceedings in respect of
 summary convictions.

Apprehension
 of offenders.
 Summary con-
 victions.

By the 61st section, in cases of felony, principals in the second
 degree and accessories before the fact are punishable in the same
 manner as principals in the first degree; and accessories after the
 fact (except receivers) are on conviction liable to be imprisoned
 for any term not exceeding two years; and abettors in misde-
 meanors are liable to be indicted and punished as principal of-
 fenders. By section 62, abettors in offences punishable on sum-
 mary conviction, are made punishable as principal offenders.

Principals and
 accessories.

Abettors in
 misdemeanors
 and in minor
 offences.

It may be observed that in a case upon the repealed statute
 24 Geo. 2. c. 45. the words “goods, wares, and merchandize”
 were considered as restrained to such goods, &c. as were usually
 lodged in vessels, or on wharfs or quays. (a) So that where the
 prisoner was indicted upon that statute for stealing a considerable
 sum of money out of a ship in port, the case was holden not to
 be within the statute, though great part of the money consisted
 of Portugal money not made current by proclamation, but com-
 monly current. (b)

As to the
 meaning of
 goods, &c.

(a) 2 East. P. C. c. 16. s. 85. p. 647. Ass. 1752. Fost. 79, in the note, S. P. in Leigh's case, O. B. 1764. 1

(b) Grimes's case, *Maidstone* Lent Leach 52.

We have seen that where the master and owner of a ship took some of the goods delivered to him to carry, it was held not to be larceny, as he did not take the goods out of their package : and it was also held that even if under the circumstances it had amounted to larceny, it would not have been an offence within the repealed statute of the 24 Geo. 2. (c)

(c) *Rex v. Madox*, Mich. T. 1805. Russ. & Ry. 92. *Ante*, p. 135.

CHAPTER THE SIXTEENTH.

OF LARCENY BY SERVANTS, AND PERSONS WHO HAVE THE
CUSTODY OF GOODS AS SERVANTS, AND NOT THE LEGAL
POSSESSION.

SOME statutes upon this subject were repealed by the 7 & 8 Geo. 4. c. 27. having been for a long time but little resorted to, as the common law applies to the fraudulent conversion by a servant, to his own use, of the goods of his master. The punishment for a felonious stealing by a servant from his master, is made more severe than in an ordinary case of larceny by 7 & 8 Geo. 4. c. 29. which will be more fully mentioned at the close of this Chapter.

Offences at
common law.

The clear maxim of the common law established by a variety of cases, is, that where a party has only the bare charge or custody of the goods of another, the legal possession remains in the owner; and the party may be guilty of trespass and larceny in fraudulently converting the same to his own use. (a) And this rule appears to hold universally in the case of servants, whose possession of their master's goods, by their delivery or permission, is the possession of the master himself. (b)

In support of this maxim of the common law here laid down, it will be proper to cite some of the more modern cases in which it has been recognized.

A sheriff's officer clandestinely selling for his own use part of the goods which he has seized under a writ of *fiери facias*, is guilty of larceny. The prisoner, a sheriff's officer, under a writ of *fiери facias* against one Bell, seized the goods in Bell's house, amongst which were some engravings in a locked closet. He removed a bead from the door of that closet, took out the engravings, and sold them for his own use. Upon an indictment against him for larceny, it was urged that this was a breach of trust only; but upon the point being saved, the Judges held it a larceny; on the ground that the officer had the custody of the goods only, like a servant, and not the legal possession: and the conviction was held to be right. (c)

Eastall's case.
Sheriff's officer clandestinely selling goods levied.

The prisoner was indicted for stealing a bill of exchange of the value of 100*l.* the property of the prosecutor. It appeared in evidence, that he was foreman and book-keeper to the prosecutor, who was a mercer at Devizes, at a yearly salary, and paid and received money for him, not living in the house, but going there

Paradise's case.
The prisoner who was employed as a foreman and

(a) 2 East. P. C. c. 16. s. 14. p. 564, *et sequ.* and the authorities there cited. And see as to a bare charge or custody, *ante*, 106, 107.

(b) 2 East. P. C. *ibid.* *Ante*, 107.

(c) Rex v. Eastall, Mich. T. 1822, MS. Bayley, J.

book-keeper, not residing in the house of his master, embezzled a bill of exchange, which he received from his master to be transmitted to a correspondent, in the usual course of business, and it was holden to be larceny.

every day to transact his business. The prosecutor delivered bills to him to the amount of 1,500*l.*, and amongst them the bill in question, with directions to enclose them in different covers, and send them by that day's post, as he had often sent bills before, to his correspondent in London, as cash to be carried to the credit of the prosecutor's account. The prisoner did not send the bills as he was directed; and the next day, having obtained the prosecutor's leave to go to visit some relations in the neighbourhood, he went to Salisbury, got cash for the bill in question, which had been indorsed by the prosecutor, and was also indorsed by the prisoner, and then went off; but was afterwards apprehended at Exeter, with part of the bills and the money. It was contended on behalf of the prisoner at the trial, that the prosecutor, having delivered the bills to him, had thereby parted with the possession of them, so that the prisoner could not be guilty of felony in taking them away; and the case was resembled to that of a carrier intrusted to carry goods. (*d*) But the prisoner was convicted; and judgment was respited, in order to take the opinion of the Judges, whether the case amounted to felony, or was only a breach of trust. They were all of opinion (with the exception of Lord Camden, who was absent,) that the case amounted to larceny; upon the principle that the possession still continued in the master. (*e*)

Robinson's case.

Bass's case. The prisoner, who was a servant and porter in the general employ of the prosecutor, had goods delivered to him by his master to carry to a customer, which he sold, and converted the money to his own use: and this was holden to be larceny; the possession of the goods not being out of the master by such delivery.

A carter going away with his master's cart was holden to have been guilty of felony. (*f*)

The prisoner was convicted of stealing gauze of the value of eighty pounds, the property of the prosecutor: and the case was referred to the consideration of the twelve Judges, upon the following facts. The prisoner was servant and porter in the general employ of the prosecutor, who was a gauze-weaver, and was sent with a package of goods from his master's house, with directions to deliver them to a customer at a particular place. In his way he met two men, who invited him into a public-house to drink with them, and then persuaded him to open the package, and sell the goods to a person whom one of the men brought in; which he accordingly did, by taking them out of the package, putting them into the man's bag, and receiving to his own use, part of the money for which they were sold. All the Judges held this to be felony, on the ground that the possession of the goods still remained in the master. (*g*)

In a case where the master of a captured vessel got property from the vessel clandestinely under particular circumstances, it seems to have been held not to amount to larceny. The vessel was Prussian, sent in by a British cruizer, and at first ordered to be restored, but afterwards, hostilities breaking out with Prussia, condemned as prize to the king, as having been taken before hostilities. The captain of the vessel lodged on shore, but went oc-

(*d*) *Ante*, 134, *et sequ.*

(*e*) *Paradice's case*, *cor.* Gould, J., *Sarum* Lent Ass. 1766. *East. T.* 1766. 2 *East. P. C. c.* 16. s. 15. p. 565., and cited by Gould, J., in *Wilkins' case*, 1 *Leach* 523, 524.

(*f*) *Robinson's case*, O. B. 1755. 2 *East. P. C. c.* 16. s. 15. p. 565.

(*g*) *Bass's case*, 1 *Leach* 251, 523, 524. 2 *East. P. C. c.* 16. s. 15. p. 566.

casionally to the ship; the shipkeeper, who was appointed when the ship was brought in, kept the keys of the hatches, and two custom-house officers and nine of the original crew remained on board. The property in question was secretly conveyed from the ship, and found at the master's, or at a place to which he had sent it, and it appeared that a bulk-head had been broken to get at part of such property. But the learned Judge before whom the prisoner was tried, doubted whether this regaining the possession of what had belonged to the master's owners, and had been entrusted to his care, amounted to a larceny, and saved the point. And ultimately the prisoner was recommended for pardon. (*h*)

In a case where the prisoner had been convicted for stealing forty bushels of oats, a question, whether the facts amounted to felony, was reserved for the opinion of the Judges. The prosecutors, who were cornfactors, had purchased a cargo of oats on board a ship, lying in the river Thames; and they sent the prisoner, who was employed in their service as a lighterman, with their barge, to one Wilson, a corn-meter, for as much oats, in loose bulk, as the barge would carry. The prisoner proceeded to the ship, and received from Wilson two hundred and twenty quarters of oats in loose bulk, and five quarters in sacks. The five quarters were put into sacks by order of the prisoner; and were afterwards embezzled by him. The question submitted to the Judges was, whether this was felony, as the oats had never been in the possession of the prosecutors; or whether it was not like the case of a servant receiving charge of, or buying, a thing for his master, and never delivering it. And the Judges held that it was larceny in the prisoner; and a taking from the actual possession of the owner, as much as if the oats had been in his granary. (*i*)

The following is a case of a similar nature. The prisoner was indicted (as in the former case) upon the statute, 24 Geo. 2. c. 45. for stealing five quarters of oats from a vessel on the navigable river Thames. The prosecutors, in whom the property was laid, were cornfactors; and the prisoner was their servant; and had been employed by them many years in superintending the unloading of their corn vessels. The prosecutors had purchased two hundred and forty quarters of oats, on board a Dutch vessel, lying in the river Thames; and while the corn-meters were in the act of unloading the oats from the Dutch vessel into the prosecutors' barge, the prisoner, with another person, came alongside in a boat, handed ten empty sacks on board the Dutch vessel, and desired that the sacks might be filled with oats, and tied, as they were going to be put into an up-country lug-boat. He also desired that the account of the oats, put into the sacks, might be

Spears's case.
A cornfactor having purchased a cargo of oats on board a ship, sent his servant with his barge to receive part of the oats in loose bulk; and the servant ordered some of them to be put into sacks, which he afterwards embezzled: this was held to be larceny.

Abraham's case.
The prosecutors, being cornfactors, purchased corn on board a vessel, and sent their barge to receive it in bulk; when their servant, who was employed by them to superintend the delivery, separated a part from the rest,

(*h*) *Rex v. Vanmuyser, cor. Chamber, J., and before the Judges in Mich. T. 1806. MS. Bayley, J., and Russ. & Ry. 118.* In *MS. Bayley, J.*, it is observed that there was no evidence to shew that the Master took the property for *himself* in opposition to the intention of his owners: and that most of the Judges seemed to think

it would have been larceny if he had, and *contra* if he had not.

(*i*) *Spears's case, Kingston Spr. Ass. 1798. 2 Leach 825. 2 East. P. C. c. 16. s. 16. p. 569.* And see the ground of the determination, as in the text, mentioned by *Heath, J.*, in *Walsh's case, 4 Taunt. 276.*

while on board the vessel, and embezzled it: and it was holden to be larceny.

carried to the score, and no separate account be made of them. The whole of the two hundred and forty quarters of oats, excepting the five quarters put into the sacks by the prisoner's desire, were loaded, in loose bulk, into the prosecutors' barge. After the sacks were filled, a person, by the prisoner's direction, took them away from the vessel to a place where they were delivered to the person who purchased them of the prisoner. The prisoner had never been employed by the prosecutors to sell corn for them; nor was he authorized so to do.

Upon these facts the jury found the prisoner guilty; and, the case being saved for the opinion of the Judges, they were of opinion that the conviction was right. (*k*) It is observed that in this case there appears to have been a tort committed by the servant in the very act of the taking; that the property of his masters in the corn was complete before the delivery to him; and that, after the purchase of it in the vessel, they had a lawful and exclusive possession of it as against all the world, but the owner of the vessel. (*l*)

Where property which the prosecutors had bought was weighed out in the presence of their clerk, and delivered to their carter's servant to cart, who let other persons take away the cart, and dispose of the property for his benefit jointly with that of the other persons, the carter's servant, as well as the other persons, was held to be guilty of larceny at common law. The prosecutors contracted for some barilla lying at the London docks; their clerk went to see it weighed, and after having been weighed in his presence, it was delivered to one of the prisoners, Harding, a carman's man, to cart. By contrivance between Harding and the other prisoners, he left the cart on his way to the prosecutor's, and the others drove it away and disposed of the barilla. The learned Judge told the jury that if Harding was to receive any benefit from the disposition he was equally guilty with the other prisoners; and the jury found all the prisoners guilty; and upon the point being saved, whether as the barilla was delivered to Harding to cart, the taking amounted to a larceny, the Judges held that it did. (*m*)

It is larceny if a person, hired for the special purpose of driving sheep to a fair, convert them to his own use; having an intention of doing so at the time of receiving them from the owner. The prosecutor saw the prisoner at Bristol fair on a *Thursday*, and hired him to drive fifty sheep for him to Bradford fair, and he was to meet the prosecutor on the following *Sunday* evening, with the sheep, at the turnpike-gate nearest to Bradford. The prisoner had no authority to sell the sheep; he was merely to drive them to Bradford, and for doing so to receive 2s. 6d. per day. He did not come to the turnpike-gate on the *Sunday*, nor to Bradford fair, which was held on the following day. The prosecutor afterwards found forty of his sheep in a field at a place quite in an opposite direction to Bradford; and it appeared that

Larceny of sheep by a person hired to drive them to a certain place, and intending to convert them to his own use at the time he received them from the owner.

(*k*) *Abraham's case*, *Surrey Spr. Ass.* 1798. 2 *Leach* 824. 2 *East. P. C. c.* 16. s. 16. p. 569.

(*l*) 2 *East. P. C. c.* 16. s. 16. p. 570.

(*m*) *Rex v. Harding and others*, tried before Lawrence, J., and considered by the Judges Hil. T. 1807. *MS. Bayley, J., and Russ. & Ry.* 125.

the prisoner had sold the remaining ten of the fifty on the same morning on which he had received them from the prosecutor, and had never gone at all towards Bradford. He never was a servant of the prosecutor, but had occasionally been employed to drive sheep for him. Though he had no authority to sell, he represented to the person who purchased the ten sheep of him, that he had such authority, and that he had frequently sold cattle for the prosecutor, and that he had sold thirty ewes for him that morning. Upon this evidence the jury found the prisoner guilty, and in answer to a question put by the learned Judge, they said they were of opinion that the prisoner *at the time he received the sheep* intended to convert them to his own use, and not to drive them to Bradford. The prisoner had no counsel; but a doubt occurred to the learned Judge whether, as the delivery to the prisoner was not at his desire, or at his request, he being hired by the owner to take charge of them for a special purpose, his not carrying that purpose into execution, but converting them to his own use, and intending so to do (as found by the jury) at the moment of receiving them from the owner, amounted to felony: and he therefore respited the sentence, in order to take the opinion of the Judges upon the point. After considering the case, the Judges were unanimously of opinion that the conviction was right: (n)

A servant going off with money, given to him by his master to carry to another, and applying it to his own use, has been holden guilty of larceny. The master of the prisoner delivered to him a sum of money to carry to a person of the name of Flawn, and to leave it with Flawn, who had agreed to give the master of the prisoner bills for the money in the course of a few days. The prisoner did not carry the money to Flawn, as he was directed, but went away with it; and, with part of it, purchased a watch and some other articles; the other part remaining in his possession when he was apprehended. The jury having found the prisoner guilty, sentence was respited, in order to take the opinion of the Judges, whether this was felony, or only a breach of trust: and all the Judges held that it was felony. (o)

In a case where the prisoner was indicted for stealing ten guineas, it appeared that she was the menial servant of the prosecutor, who was a manufacturer, and frequently in want of silver to pay his workmen; that she went to the wife of the prosecutor, and told her that she was acquainted with a person who could give her ten guineas' worth of silver; upon which the wife of the prosecutor gave her ten guineas for the purpose of getting them changed into silver by the person she had mentioned, when, instead of getting the guineas changed, she immediately ran away with them, and never returned; and it also appeared that her clothes had been previously taken away. Upon this evidence she was found guilty of larceny. (p)

(n) *Rex v. Stock*, cor. Park, J., Taunton Lent Ass. 1825, and East. T. 1825. 1 Ry. & Mood. C. C. 87.

(o) Lavender's case, *Huntingdon Lent Ass.* 1793, twice considered by the Judges, East. T. 1793, and Trin.

T. 1793. In this case all the Judges also held that the last point in Watson's case, 2 East. P. C. p. 562., was not law.

(p) *Rex v. Atkinson*, 1 Leach 302, 303, note (a). There is sub-

Lavender's case. Holden that a servant going off with money which his master had given him to carry to another, and applying it to his own use, is guilty of larceny.

Atkinson's case. A servant obtained ten guineas from her mistress, under a pretence that she knew a person who would give silver for them; and then ran away with the guineas: and she was found guilty of larceny.

Chipchase's case.

A clerk who had the management of the cash concerns of the prosecutors, and had authority to get their bills discounted, as occasion required, discounted a bill, and absconded with the money; and it was holden to be larceny.

It has also been holden to be larceny for the confidential clerk of a merchant to take a bill of exchange, undorsed, from its proper repository, discount it, and convert the proceeds to his own use, though he had the general management of his master's cash concerns, and authority to get his bills discounted. The indictment against the prisoner was for stealing a bill of exchange for one hundred and twenty-two pounds twelve shillings, the property of the prosecutors, Messrs. Burkit and Fothergil. Upon the evidence it appeared that the prisoner was clerk to the prosecutors, and had the sole management of their cash concerns; that he received bills and money remitted to them, took bills to be discounted whenever he wanted cash, made payments for freight and other things of a similar nature, and settled the balance with the prosecutors at the end of every week. On the 14th September, 1795, the bill in question was remitted to the prosecutors, by the post, when one of them opened the letter, and gave the bill, which was not due till the 17th September, to a clerk to get it accepted; which the clerk accordingly did, and then laid it amongst other bills on the desk of the prosecutors. On the 16th September the prisoner carried the bill in question, together with another bill, to the prosecutors' bankers, when the banker's clerk, observing that neither of them were indorsed by the prosecutors, asked him whether they were to be entered short or discounted; upon which he said that he wanted small notes and money for them, and that the money must be full weight, and good, as it was for the particular use of the prosecutors. On the same day he absconded with the monies he had so received, and was taken, under a feigned name, from on board a ship at Falmouth. It was contended on behalf of the prisoner, that the bill having come legally into his possession like any other bill of the prosecutors over which he had a disposing power, he had a right to receive the money for it, though not to convert the money, when received, to his own use: and that, the first taking of the bill not being tortious, his receiving the money for it at the bankers, and going away with the money was a mere breach of trust and no felony. But Heath, J., was clearly of opinion that this was felony; the bill having been once decidedly in the possession of the prosecutors, by the clerk, who got it accepted, putting it amongst the other bills on the prosecutors' desk; and the prisoner having feloniously taken it away from that possession. (q)

Hammon's case.

A banker's clerk falsely informed a

A case of modern occurrence requires to be noticed in the same class. The prisoner was indicted for stealing two bank-notes of fifty pounds each, in the dwelling-house of the prosecutors. The facts given in evidence were, in substance, that the prisoner was

joined "*Sed quære*, if the case was not saved?" The doubt in this case would be whether the *property* in the guineas was not so parted with by the wife of the prosecutor, as to exclude the idea of felony, (*ante*, 109). But it should seem that it might be well contended that the *property* in the guineas was not parted with to the prisoner; and that she had only the

possession of them upon a bare charge, or special trust, to get them changed. *Ante*, 106, *et sequ.*

(q) Chipchase's case, *cor.* Heath, J., O. B. 1795. 2 Leach 699. 2 East. P. C. c. 16. s. 15. p. 567. The prisoner was accordingly convicted, and sentenced to be transported for seven years.

a clerk in the banking-house of the prosecutors, and was intimate with a gentleman named Vale whom he had induced to open his cash account at the house. On the 19th December, 1811, he made a fictitious entry in the banking book of Mr. Vale, to his credit, for two hundred pounds; which sum he told Mr. Vale that he had that morning paid in on Mr. Vale's account. On the belief that this false entry and false assertion were true, Mr. Vale, on the 10th January, 1812, gave him a check on the prosecutors, dated, by the prisoner's desire, on the day before, for one hundred pounds; for payment of which the prisoner, under colour of serving at the counter, took out of the prosecutors' bank-note drawer, in the shop, the two notes stated in the indictment, depositing the check among the other paid checks of the day, and making in the waste-book an entry of such payment. By this contrivance and other previous practices of the like kind, Mr. Vale's real balance was turned against him to the amount of several hundred pounds: and, in order to prevent the discovery which must have immediately ensued if the accounts had been suffered to continue in this state, the prisoner made other false entries, to the credit of Mr. Vale, in the ledger of the house. Upon these facts the jury found the prisoner guilty; (r) and they also found that at the time he made the false entries in the ledger, and in the customers' book, he did it fraudulently, with the design of enabling himself to get the money of the prosecutors. The question whether the offence was a felony, or amounted only to a fraud, was afterwards submitted to the consideration of the Judges: and eleven of them who met, held, that the offence was felony, that the taking was felonious, and that the depositing the check was not intended to pledge Vale's security, but to prevent detection; as Vale did not give the check to pledge his own credit, or to enable the prisoner to get money of his, Vale's, but to enable the prisoner to get away (as he supposed) money of his own. And Grose, J., in delivering the opinion of the Judges, said, "The true meaning of larceny is 'the felonious taking the property of another without his consent, and against his will, with intent to convert it to the use of the taker.' (s) The facts of the case answer every part of this definition. The taking of the property is clear; and that it was taken against the will of the owner, and with a felonious intent, is equally clear, from the circumstance of the prisoner's having fraudulently made these *false entries* with a view to conceal the means he had artfully made use of to obtain it." (t)

By the cases which have been now cited, the maxim of the common law, already mentioned, relating to the fraudulent conversion by a servant to his own use of the goods of his master, appears to be sufficiently explained and established. But it should be observed that in all these cases it was considered that the pro-

customer of the house that he had paid in money to his credit, and thereby induced the customer to give him a check for the amount, and received the money; and then to prevent a discovery, made fictitious entries in the books. This was holden to be larceny, the check being drawn by the customer not to pledge his own credit, or to draw out money of his own, but to draw out the money so falsely pretended by the prisoner to have been paid in by him.

In the foregoing cases the property stolen was received into the possession of the master

(r) The jury said, that as the prisoner had the check he had a right to pay himself, but, Bayley, J., before whom the prisoner was tried, told them that this was matter of law. Their opinion, however, was stated in the case, MS. Bayley, J.

(s) *Ante*, 93.

(t) Hammon's case, O. B. Feb. 1812, and May, 1812. 2 Leach 1083. S. C. 4 Taunt. 304. MS. Bayley, J., and Russ. & Ry. 221. Lawrence, J., who was absent, doubted.

before the taking by the servant. But property is not sufficiently received into the master's possession, where it has merely been delivered to the servant for the master's use; and, therefore, a servant purloining such property, is not guilty of larceny.

property stolen was sufficiently received into the possession of the master before the taking by the servant. And this leads to the consideration of a material distinction respecting the possession of the master, namely, that the property will not be considered as sufficiently received into his possession, where it has merely been delivered to the servant for the master's use. Upon which subject it is well laid down that "if the servant have done no act to determine his original, lawful, and exclusive possession, as by depositing the goods in his master's house, or the like, although to many purposes, and as against third persons, this is in law a receipt of the goods by the master, yet it has been ruled otherwise in respect of the servant himself, upon a charge of larceny at common law, in converting such goods to his own use." (u) The ground of which doctrine appears to be that in such case there can be no tortious taking in the first instance, and consequently no trespass: and we have seen that without a trespass there can be no larceny. (x)

Waite's case.
Before the 15 Geo. 2. c. 13. s. 12. it was holden that a cashier of the Bank of England, to whom a bond was delivered for the purpose of being deposited with the bank, was not guilty of felony in converting it to his own use before it had been deposited in the proper place.

Bull's case.
The prisoner who was a servant attending the shop, received some money from a customer, which he did not put into the till, but purloined: and it was holden not to be larceny; the money not having been in the possession of the master.

Upon this principle, in a case prior to the statute 15 Geo. 2. c. 13. s. 12, (y) where it appeared upon an indictment for stealing East India bonds, the property of the governor and company of the Bank of England, that the bonds in question, having been taken to the bank for the purpose of being deposited there, were not carried to the usual place for such deposits, namely, a chest in the cellar of the bank, but were received by the prisoner, who was a cashier there, and placed by him in his own desk, it was ruled that the prisoner was not guilty of larceny in afterwards selling the bonds, and putting the money into his own pocket. And the ground of the decision appears to have been that as the bonds were never put into the cellar, in the usual course, the governor and company of the bank had no possession of them, but the possession remained always in the prisoner. (z)

In another case where the prisoner was indicted for stealing a half-crown and three shillings, the property of his master, the same principle was recognized. The master of the prisoner was a confectioner; and the prisoner was his servant, employed to attend the shop. The master, having some suspicion that the prisoner had occasionally purloined the money paid by persons dealing at the shop, procured a customer to come there on pretence of buying something, having previously given to such customer some marked silver of his own. The customer accordingly came to the shop in the absence of the master, and bought some articles of the prisoner, paying for them with the marked silver. Soon afterwards the master (who was waiting for the purpose) came in and examined the till, in which the prisoner ought to have deposited the silver when it was received; and finding only some of the marked silver there, he procured the prisoner to be immediately

(u) 2 East. P. C. c. 16. s. 16. p. 568.

(x) *Ante*, 95.

(y) *Post*. Chap. XX.

(z) *Waite's case*, *cor.* Carter and Dennison, *Js.*, O. B. 1743. 1 Leach 28. 2 East. P. C. c. 16. s. 17. p. 570.

Dennison, *J.*, said, that though this might be such a possession in the bank whereon they might maintain a civil action, yet there was a great difference between such a possession and a possession whereon to found a criminal prosecution.

apprehended and searched, when the rest of the marked money was found upon him. The jury found the prisoner guilty; but the point being saved for the consideration of the twelve Judges, they were of opinion that the prisoner was not guilty of larceny, but only of a breach of trust; the money never having been put into the till, and, therefore, not having been in the possession of the master, as against the prisoner. (a)

Both these cases were much relied upon, in a subsequent case, on behalf of the prisoner, a banker's clerk, who was indicted for stealing a bank-note of the value of one hundred pounds, the property of the bankers. The evidence was, in substance, that a gentleman, who kept cash with the bankers, sent, by his servant, the one hundred pound bank-note in question, together with twenty-two pounds in other bank-notes, and fifteen pounds in money; and that the servant delivered the whole into the hands of the prisoner. The prisoner, in his capacity of clerk to the bankers, was *authorized to receive and give a discharge for the same*; and it was his duty to put the money received into a till, and to place in another drawer the several bank-notes, which he might receive during the day, for the purpose of another clerk taking down and entering in a book the particular description of each note. The prisoner gave an acknowledgment to the servant of having received the full sum of one hundred and thirty-seven pounds, and put the money into the till; but instead of placing the remaining sum of one hundred and twenty-two pounds, which he received in bank-notes, into the drawer, according to his duty, he kept back the one hundred pound note in question, and only delivered over those to the amount of twenty-two pounds. The jury found the prisoner guilty, subject to the opinion of the Judges, whether the taking could be considered as felonious, or only as a breach of trust? When the case came to be argued, an additional fact was stated and admitted, namely, that the prisoner had given his employers security to account for what he received and against embezzlements. The case was argued at considerable length before nine of the Judges, who, at first, entertained some doubt on the case, but ultimately agreed that it was not felony; inasmuch as the note was never in the possession of the bankers, distinct from the possession of the prisoner; but that it would have been otherwise if the prisoner had deposited it in the drawer, and had taken it afterwards. (b)

In consequence of this decision (of which however it should be observed, that it was perfectly in unison with the due administration of criminal justice, in adopting the merciful construction of a doubtful point of law) it was thought necessary forthwith to make some provisions for the better protection of masters against embezzlements by their clerks and servants; many of whom, employed in commercial transactions, are unavoidably entrusted with the receipt of monies to a large amount. The statute 39 Geo. 3. c. 85. was accordingly passed, and though that statute is now repealed, the recent statute 7 & 8 Geo. 4. c. 29. provides for the punishment

Bazeley's case.

A banker's clerk, who was entrusted to receive bank-notes and money at the counter, instead of putting a note into the proper drawer, secreted it, and converted it to his own use: and this was holden to be only a breach of trust, and not larceny; the note never having been in the banker's possession.

In consequence of the foregoing decision the 39 Geo. 3. c. 85. was passed, for protecting masters from the embezzlements of their clerks and servants.

(a) Bull's case, *cor.* Heath, J., O. B. Jan. 1797; Hil. Term, 1797, cited in Bazeley's case, 2 Leach 841. 2 East. P. C. c. 16. s. 17. p. 572.

(b) Bazeley's case, O. B. 1799. East. T. 1799. 2 Leach 835. 2 East. P. C. c. 16. s. 17. p. 571.

of such embezzlements, and will be considered in the succeeding chapter.

Punishment
of larceny by
servants, &c.

It is only necessary further in this place to notice the 7 & 8 Geo. 4. c. 29. s. 46. which for the punishment of depredations committed by clerks and servants, in cases not punishable capitally, enacts "that if any clerk or servant shall steal any chattel, money, or valuable security belonging to or in the possession or power of his master, every such offender, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fourteen years, nor less than seven years, or to be imprisoned for any term not exceeding three years; and if a male to be once, twice or thrice publicly or privately whipped (if the court shall so think fit) in addition to such imprisonment."

Principals and
accessories.

The 61st section of the act making principals in the second degree, and accessories before the fact, punishable in the same manner as principals in the first degree, applies to every felony punishable under the act; as does the provision also by which accessories after the fact (except receivers of stolen property) are made liable to imprisonment for any term not exceeding two years. (c) .

(c) See the clause *ante*, 179. *Larceny*.

CHAPTER THE SEVENTEENTH.

OF EMBEZZLEMENT BY CLERKS AND SERVANTS.

THE statute 7 & 8 Geo. 4. c. 29. s. 47. for the punishment of embezzlements committed by clerks and servants, declares and enacts, "that if any clerk or servant, or any person employed for the purpose or in the capacity of a clerk or servant, shall, by virtue of such employment, receive or take into his possession any chattel, money, or valuable security, for or in the name or on the account of his master, and shall fraudulently embezzle the same, or any part thereof, every such offender shall be deemed to have feloniously stolen the same from his master, although such chattel, money, or security, was not received into the possession of such master, otherwise than by the actual possession of his clerk, servant, or other person so employed; and every such offender, being convicted thereof, shall be liable, at the discretion of the court, to any of the punishments which the court may award, as hereinbefore last mentioned."

7 & 8 Geo. 4. c. 29. clerks or servants receiving any money, &c. on their masters' account, and embezzling it, shall be deemed to have feloniously stolen it.

The 48th section of the same statute for preventing the difficulties that have been experienced in the prosecution of the last mentioned offenders enacts "that it shall be lawful to charge in the indictment, and proceed against the offender, for any number of distinct acts of embezzlement not exceeding three, which may have been committed by him against the same master, within the space of six calendar months from the first to the last of such acts; and in every such indictment, except where the offence shall relate to any chattel, it shall be sufficient to allege the embezzlement to be of money, without specifying any particular coin or valuable security; and such allegation, so far as regards the description of the property, shall be sustained, if the offender shall be proved to have embezzled any amount, although the particular species of coin or valuable security of which such amount was composed shall not be proved; or if he shall be proved to have embezzled any piece of coin or valuable security, or any portion of the value thereof, although such piece of coin or valuable security may have been delivered to him in order that some part of the value thereof should be returned to the party delivering the same, and such part shall have been returned accordingly."

Distinct acts of embezzlement may be charged in the same indictment.

As to allegation and proof of the property embezzled.

These provisions are substituted for the repealed statute 39 Geo. 3. c. 85. and those contained in the 48th section are intended to remove the very considerable difficulties which so often

prevented a prosecution under the repealed statute from being effectual. The full case upon which the master had arrived at the conclusion of his servant's guilt, and determined to prosecute, could hardly ever be laid before the jury, on account of the rule which forbids evidence to be given of two distinct and independent felonies upon one indictment; it repeatedly occurred that the person from whom the prisoner had received the money could not specify the mode of payment; and it happened not unfrequently that the prisoner had received a piece of coin or a note of a larger amount than the sum which was to be paid on account of his master, and had given change. In the former of these cases the jury often acquitted, from an impression that the prisoner had acted by mistake, and unintentional error; an impression which would have been removed, if the facts upon which the master proceeded could have been fully laid before them; and in the two latter cases the prosecution necessarily failed, as being unsupported by the evidence. It is conceived that a better remedy for these defects would have been applied by making the offence a misdemeanor, as the anomalous averments and evidence introduced, by the 48th section, upon a prosecution for *felony*, would have been avoided, and the prisoner would have had his full defence by counsel; a privilege which, from the nature of the charge, would, in many cases, be highly beneficial.

The statute similar in its effect to the repealed statute 39 Geo. 3. c. 85.

This enactment of the 7 & 8 Geo. 4. c. 29. s. 47. like the repealed statute of the 39 Geo. 3. has the effect it should seem of constituting the offence described in it a larceny. It specifies what the circumstances are which shall be sufficient to constitute such offence a larceny, and under which circumstances the offender shall be deemed to have *feloniously stolen*. First, he must be a clerk or servant; then he must by virtue of his employment receive or take into his possession some chattel, money, &c.; and that must be for or in the name or on the account of his master; and he must fraudulently embezzle the same. But probably this statute like the 39 Geo. 3. would be considered not to apply to cases which amount to larceny at common law. (a) Some of the points decided upon the construction of the repealed statute, may properly be noticed.

Cases decided upon the repealed statute 39 Geo. 3. c. 85.

It was held that a female servant was within that statute. (b) And that statute was held not to be confined to the clerks and servants of persons in trade, but to extend to the clerks and servants of all persons whomsoever, if such clerks and servants were employed to receive money, &c.: so that it was decided by the Judges on the point being reserved for their consideration, that a person employed at a yearly salary under the appellation of accountant and treasurer to the overseers of a township, and whose duty it was to receive all monies receivable or payable by them, was a clerk and servant within that statute. (c) And a person employed upon commission to travel for orders, and to collect debts, was held to be a *clerk* within that act, though he was em-

(a) *Rex v. Hedge*, Russ. & Ry. 267. 160. *post*. 209.

(c) *Rex v. Squire*, York Spr. Ass.

(b) *Rex v. Elizabeth Smith*, Hil. T. 1818, 2 Stark. C. 349., and Russ. & Ry. 349. 1814, MS. Bayley, J., and Russ. & Ry.

ployed by many different houses, on each journey, and paid his own expences out of his commission each journey, and did not live with any of his employers, nor act in any of their counting-houses. In the case in which this point was decided, it appeared that the prisoner was employed by many houses as a traveller to get orders, and to receive debts, and had a commission on such orders and debts; and further, that he paid his own expences, and did not live with any of his employers, or act in any of their counting-houses. Stanley and Co. were amongst his employers. He had embezzled part of the money which he had collected for them, and was indicted under this statute; and the indictment stated that he was employed by Stanley and Co. in the capacity of a *clerk*, and by virtue of his said employment received, &c. The prisoner having been convicted, a case was reserved, upon which the Judges thought the conviction right. (d) In another case, it was held that a servant employed to carry out goods in his employer's barge, to sell them and to bring back the price came within the statute, by embezzling the money for which the goods sold, although he was to have a certain part of such money for his pay. The prosecutor had a colliery, and barges, and employed the prisoner as captain of one of his barges to carry out and sell coals, and his duty was to bring back the money for which the coals sold, but he was entitled to two-thirds of the difference between such money and the value at the colliery, and duties. He received twenty waggon loads to take down the river to the best market, and he sold them at Gainsborough, at eighteen shillings per chaldron, the value, when he received them, having been fourteen shillings the chaldron. He embezzled the money, but it was urged that he was not a servant within the statute, and that he had a joint interest with the prosecutor in the money he received. A majority of the Judges held that he was a servant within the statute, and that so much of what he received as equalled the value at the colliery, and duties, was received solely for the use of the prosecutor, and that the embezzlement of it was an offence within the statute. (e)

An apprentice, though under the age of eighteen, was held to be within the statute: but it was considered as extending only to such servants as were employed to receive money, and to instances in which they received what they embezzled by virtue of their employment. A butcher's apprentice under eighteen carried a bill for seventeen shillings and ten-pence to a customer, from whom he obtained the money, and embezzled it, but it appeared that he had never been employed to receive money for his master. Upon a case reserved for the purpose of taking the opinion of the Judges whether the act extended to apprentices, the Judges seemed to think that it did, there being no exception, but on the ground that the prisoner was never employed to receive money, and therefore did not receive this by virtue of his employment, the conviction was held wrong. (f)

(d) *Rex v. Carr*, Mich. T. 1811, MS. Bayley, J., and Russ. & Ry. 198., and *Rex v. Leach*, 3 Stark. N. P. C. 70.

(e) *Rex v. Hartley*, Hil. T. 1808,

MS. Bayley, J., and Russ. & Ry. 139.

(f) *Rex v. Mellish*, East. T. 1805, MS. Bayley, J., and Russ. & Ry. 80.

It was however decided that a person was sufficiently a servant within this act, though he was only occasionally employed when he had nothing else to do. And that it was sufficient if he was employed to receive the money he embezzled, though receiving money were not his usual employment; and though it was the only instance in which he was so employed. The prisoner applied to a carrier to give him some employment, and the carrier agreed to let him carry out parcels and go with messages when he had nothing else to do. On the fourth day of his employment, the carrier gave him an order on which he was to receive 2*l.*, which money he received and embezzled: and the Judges, upon a case reserved, held that his conviction was right. (*g*)

Where a servant received money for his master for an article made out of his master's materials, and embezzled such money, the offence was held to be within that statute, although the servant made the article, and was to have a given proportion of the price for making it. A turner's man received an order on his master's account for six dozen coffee-pot handles, his business being to receive orders, take the necessary materials from his master's stock, work them up, deliver out the articles, receive the money for them, and pay over the whole money to his master: but at the end of the week he was entitled to receive a proportion of the money back for his work upon the articles. In the present case he had taken the materials from his master's stock, made the coffee-pot handles on his premises, delivered them to the customer, and received the money: but he had concealed the transaction from his master, and kept the money, which was three shillings, and of which his share would have been one shilling. Upon an indictment for embezzling the three shillings, the learned Judge doubted whether it was not rather a fraudulent concealment of the order, and an embezzlement of the master's materials; but upon a case reserved, all the Judges who met thought it was an embezzlement of the money, and that the conviction was right. (*h*)

Receiving immediately from a customer that which in the ordinary course the servant would have received through the medium of another servant employed to collect from customers was held to be a receipt by virtue of the employment of the servant who so received immediately from the customer, in a case where the servant, being intrusted to receive at home from out-door collectors, received abroad from an out-door customer. The prisoner was servant to a carcase butcher, and part of his business was to receive every evening from the out-door porters the money they had received from customers in the course of the day, and to pay it over to another clerk. He went himself to an out-door customer and received of him at the customer's house 1*l.* 8*s.* 7*d.*, which he embezzled. A case was saved for the opinion of the Judges, on the ground that this receipt was not within the prisoner's regular trust and employment, but the Judges thought that as the prisoner

(*g*) *Rex v. Spencer*, East. T. 1815, MS. Bayley, J., and Russ. & Ry. 299. and see *Rex v. Smith*, *post.* 211.

(*h*) *Rex v. Hoggins*, *cor.* Bayley, J.,

and before nine of the Judges, East. T. 1809, MS. Bayley, J., and Russ. & Ry. 145.

was intrusted to receive from the porters who would have collected from the customer, the receiving *immediately* from the customer instead of *mediately* through the porter, was such a receipt as the act was intended to protect, and the conviction was held right. (i)

It was also decided upon the same statute, that where a servant generally employed by his master to receive sums of one description and at one place only, was employed by him in a particular instance to receive a sum of a different description and at a different place, this latter sum should be considered as received by him by virtue of his employment, because he filled the character of servant, and it was by being employed as servant that he received the money. The lessees of two toll-bars employed the prisoner to collect the tolls at one, and in a particular instance ordered him to receive the money collected by another person at the other; which he received accordingly, and embezzled it. A case being reserved upon the question, whether he received that money by virtue of his employment, Abbott, C. J., Holroyd, J., and Garrow, B., thought he did not, because it was out of the course of his employment to receive that money; but Park, J., Burrough, J., Best, J., Hullock, B., and Bayley, J., thought otherwise, because, though this was out of the ordinary course of his employment, yet as he was servant to the lessees, and in his character of servant to them had submitted to be employed by them to receive this money, and had received it by virtue of his being so employed, the case was within the statute, and the conviction right. (k)

Shortly after the 39 Geo. 3. c. 85. was passed, it was ruled, that it was an offence within its provisions for a servant to embezzle money received from a customer of his master's, though the money had been given to the customer by the master in order that it might be paid in the course of business to the servant, for the purpose of trying the servant's honesty. The indictment charged the prisoner, as a servant of one John Gregory, with receiving the sum of seven shillings from one Hannah Morris, for and on account of his master, and afterwards feloniously embezzling the same. On the evidence it appeared that Gregory, who was a potatoe-merchant, having reason to suspect the prisoner of dishonesty, procured Hannah Morris to come to his shop with a marked seven-shilling piece of his own money, there to purchase potatoes, and pay for them with the seven-shilling piece. She came accordingly, bought potatoes to the amount of one shilling and three pence, and paid the marked seven-shilling piece to the prisoner, who gave her out of his own pocket five shillings and nine-pence in change, though he might have given the change out of monies belonging to his master which had been left in the counting-house for that purpose. The seven-shilling piece was afterwards found secreted in the prisoner's box. Upon this evidence it was contended, on behalf of the prisoner, that the case was not

Whittingham's case. The statute 39 Geo. 3. held to apply to a servant who embezzled money received from a customer to whom his master had given it for the purpose of trying the servant's honesty.

(i) *Rex v. Beechy, cor. Knowlys, and Russ. & Ry. 319.*
C. S. at the Old Bailey, and before the Judges, Hil. T. 1817, MS. Bayley, J.,
(k) *Rex v. Smith, Tr. T. 1823, MS.*
Bayley, J., and Russ. & Ry. 516.

within the act; and that the act applied only to cases where the monies had been paid to the servant by other persons than the master, and not, as in this case, where the monies had come intermediately from the hand of the master: but the court was perfectly satisfied that there was nothing in the objection, and that if a servant received the money, either from the master, or from a third person on the master's account, it was sufficient. (l)

Headge's case. In this case it was decided by the twelve Judges, that a servant secreting money which the master had marked and sent by a person to be used in making a purchase at his shop, with a view of trying the honesty of the servant, committed an offence within that statute.

The same objection was, however, again taken in a case which occurred some years afterwards, and was submitted to the consideration of the twelve Judges, who were of opinion, that it was not well founded. The prisoner was indicted for embezzling three shillings, the property of his masters, James Clarke and John Gyles. The evidence was, in substance, that Messrs. Clarke and Gyles, whom the prisoner served in the capacity of shopman, having reason to suspect that he embezzled some of the monies received by him in the shop, one of them, Mr. Gyles, on the day mentioned in the indictment, formed a plan for detecting him. In pursuance of it, he first took an account of the money at that time in the till, and marked it; and then went to the house of a neighbour where he took three shillings from his pocket, marked them also, and then gave them to his neighbour's servant, one Frances Moxon, who by his desire, and also by the order of her mistress, went with them to the shop of Messrs. Clarke and Gyles, and purchased of the prisoner, who was then serving in the shop, articles exactly amounting to three shillings, and paid for them with the three shillings given her by Mr. Gyles. It was clearly proved that the prisoner embezzled these three shillings. Upon this evidence it was submitted to the court, on the behalf of the prisoner, that as the three marked shillings were the property of the prosecutors, and had been taken out of Mr. Gyles's own pocket for the sole purpose of trying the fidelity of the prisoner, the delivery of them to Frances Moxon had not changed the possession of them, which, it was contended, remained constructively with the prosecutors up to the moment when the embezzlement took place; and therefore that the charge should have been for a larceny at common law, and not for an embezzlement under the statute. The court over-ruled the objection; but, upon the prisoner being found guilty, saved the point for the consideration of the twelve Judges; who were of opinion that the case was clearly within the statute, and the conviction proper. Grose, J., who delivered their opinion, referred to Bull's case, (m) as in point; and said, that from that case it appeared that the present, which was precisely similar in its circumstances, was not a case of larceny at common law, but a breach of trust, and as such within the terms and operation of the statute. (n)

The repealed act 39 Geo. 3. c. 85. held not

But where the property taken was delivered to the servant by the master himself, it was decided that the case was not within

(l) Whittingham's case, O. B. 1801, 2 Leach 912. But the prisoner was acquitted upon another objection.

(m) *Ante*, 204.

(n) Headge's case, O. B. 1809. 2

Leach 1033. Russ. & Ry. 160. It seemed to be the opinion of the Judges that the statute did not apply to cases which are larceny at common law.

the repealed statute. Thus, where the evidence was that the prisoner received from her master two five pound notes, and some other money to pay amongst other things 5*l.* 3*s.* to the overseer, and the overseer proved that she had never paid him, the Judges held a conviction upon these facts to be wrong. (*o*) In a later case the indictment charged the prisoner with having received and taken into his possession one shilling on account of his master, and embezzling the same; and upon the evidence it appeared, that having two shillings and sixpence of his master's money, to pay on account of his master, he only paid one shilling and sixpence, and converted the other shilling to his own use; upon which the learned Judge directed the jury to acquit the prisoner. (*p*)

In a case where the prisoner had been convicted at the assizes upon the repealed statute 39 Geo. 3. c. 85. and adjudged to be transported for fourteen years, upon an indictment, several counts of which charged him with embezzling bank-notes against the form of the statute, and others with stealing bank-notes in the common form of counts for larceny, it was assigned for error that this was a misjoinder, the counts for embezzlement on the statute, and the counts for grand larceny being counts upon which a different judgment ought by law to be given. But the court of King's Bench were of opinion that the counts for embezzlement might well be joined with the counts for larceny, considering that the statute had in fact made the offence of embezzlement described in it a larceny; and that, having so done, it had attached upon it all the properties and consequences attaching upon the crime of larceny. And Lord Ellenborough, C. J., said, "If this were an offence of a perfectly different nature, I should have been of opinion that the judgment could not have been sustained. But the act says, that the offender shall be deemed to have feloniously stolen, which is expressly constituting it a felony, and having so done, the offender must, as in the like cases of felony, pray the benefit of clergy. But inasmuch as it is larceny, and therefore liable only to the punishment of seven years' transportation, this act goes further, and gives power to transport for fourteen years. The act does not alter the quality of the offence; he is to be deemed a felon, and as such must pray the benefit of clergy, just the same as if this enactment for an extended term of transportation had not been found in the statute. It makes no alteration in the judgment; the judgment is to pass against him as a felon; if he does not pray the benefit of clergy, it must be a judgment of death. And in a variety of cases, though the punishment be different, yet counts may be joined." And he further added, "Here I think it does not appear that there is a misjoinder; because both are clergyable felonies; and the defendant is liable to the punishment incident to such a felony with an extension of it to the term of fourteen years." (*q*)

Except as the 48th section of the new act of 7 & 8 Geo. 4. may Indictment,

to apply where the property taken was delivered to the servant by his master.

Johnson's case. Counts for larceny at common law, and for embezzlement under the repealed statute 39 Geo. 3. c. 85., held to have been properly joined in the same indictment.

(*o*) *Rex v. Eliz. Smith*, Hil. T, 1814, M.S. Bayley, J., and Russ. & Ry. 287

(*p*) *Peek's case*, cor. Park, J., *Stafford Sum. Ass.* 1817, MS. But it was usual in indictments upon this statute

to add a count for larceny at common law.

(*q*) *Rex v. Johnson*, 3 M. and S. 549, 550.

have otherwise provided, it seems that the indictment ought to contain all the requisites of an indictment for larceny at common law.

M'Gregor's case. Held upon the repealed stat. 39 Geo. 3. c. 85., that the indictment ought to contain all the requisites of an indictment for larceny at common law.

In a case upon the repealed statute 39 Geo. 3. an indictment was holden to be defective, because it did not expressly aver that the money alleged to have been feloniously stolen taken and carried away by the prisoner was the money of any particular person. The point was reserved for the opinion of the Judges, and was argued before them at considerable length. It was contended, on behalf of the prisoner, in support of the objection, that as the statute had not made the sort of embezzlement therein mentioned *eo nomine* a distinct and substantive felony, but had only enacted, that the property received into the possession of the servant, and feloniously converted by him, should be considered as having been by such conversion feloniously taken from the possession of the master, the offence still continued a common law larceny; and that consequently an indictment framed upon the statute must contain all the requisites of an indictment for larceny at common law. And in order to shew that it would not be a sufficient answer to the objection, to say that the indictment had followed the words of the statute, several instances were mentioned of indictments upon particular statutes, 1 Edw. 6. c. 12. s. 10. 8 Eliz. c. 4. 22 Car. 2. c. 5. 3 & 4 W. & M. c. 9. s. 1. 10 & 11 W. & M. c. 23. s. 1. 12 Ann. c. 7. and 24 Geo. 2. c. 45. relating to the stealing of particular goods, or stealing goods under certain circumstances, all of which pursue the same form as to the requisite parts of larceny at common law. On the part of the crown it was argued, that the statute in question made the embezzling by servants, in the manner stated, a substantive felony, which before was only a misdemeanor, or breach of trust, for which the master had a civil remedy. That it was therefore sufficient to follow the words of the act, as in other instances where new offences were created; which differed from indictments on statutes merely ousting the offender from clergy in cases which were before larcenies at common law. That the legislature, in this instance, meant to include cases where, from the property being, as it were, in transitu, it was difficult to ascertain in whom it was at the time of the offence committed; and that it therefore intended to relieve the prosecutor from the necessity of laying it to be in any particular person. That at any rate no technical form of words was necessary in charging a thing to be the property of another; and that here enough was stated, to shew that it was not the prisoner's own property, being charged to have been received by him on account of his masters; which was tantamount to an allegation of their having a special property in it. It appears that the Judges at first doubted much upon this case, but that ultimately a majority of them were of opinion that the indictment was defective, as it did not aver that the money alleged to have been stolen was the money of the prosecutors; that the statute made the offence a larceny, and made the possession of the servant, under such circumstances, the possession of the master. (r)

(r) M'Gregor's case, O. B. 1801. Pal. 106. 2 East, P. C. c. 16. s. 18. Feb. 1802. 2 Leach 932. 3 Bos. and p. 576. Russ. & Ry. 23.

The 48th section of the new statute enacts "that except where the offence shall relate to any chattel, it shall be sufficient in the indictment to allege the embezzlement to be of money without specifying any particular coin or valuable security; and that such allegation, so far as regards the description of the property, shall be sustained, if the offender shall be proved to have embezzled any amount, although the particular species of coin or valuable security of which such amount was composed shall not be proved."^(s) This is one of the enactments intended to prevent the difficulties experienced in the prosecution of offenders under the repealed statute of the 39 Geo. 3. Under that statute it had been holden that if the evidence did not shew that the prisoner embezzled some part of the property specified the case against him could not be established. An indictment stated that the prisoner received 1*l.* 2*s.* 6*d.* in monies numbered, and 6*l.* in one-pound notes, and embezzled part thereof, namely fifteen shillings and seven-pence in monies numbered, and one 1*l.* note: the evidence was that he received at the same time much other money, and many other notes, but that instead of giving credit for 7*l.* 2*s.* 6*d.*, he only gave credit for 5*l.* 6*s.* 10*d.* Upon a case reserved, the Judges held, that as he might have paid over the whole of what he received for the 7*l.* 2*s.* 6*d.*, and have taken the 1*l.* 15*s.* 7*d.* from the other monies he received, he was improperly convicted, there being nothing to shew that he had stolen any part of that money which he was charged with stealing.^(u) But it was also holden upon that statute, that if a servant immediately on receiving a sum for his master entered a smaller sum in his master's books, and ultimately accounted to his master for the smaller sum only, he might be considered as embezzling the difference at the time he made the entry; at least that the jury might so find. And that it would not alter the case if he received other sums for his master on the same day, and in paying those and the smaller sum to his master together, he might have given his master every piece of money, or every note he had received at the time he made the false entry. The prisoner received for his master from Mrs. W. eighteen one-pound notes, and immediately entered in his master's books 12*l.* only: in the course of the day he received, for his master, 104*l.* more, and after that time paid him 116*l.* The indictment charged him with embezzling six of the notes which he received from Mrs. W., and it was urged on his behalf, at the trial, that he might have paid over in the 116*l.* every one of the notes which he

Allegation as to the property embezzled.

(s) See the section, *ante*, p. 207.

(u) *Rex v. Tyers*, Mich. T. 1819. MS. Bayley, J., and Russ. & Ry. 402. The notes had been in the master's possession, who took them and placed them on a heap with others before the prisoner, and this objection was made by the prisoner's counsel, and seemed to be acquiesced in, and the case confined to the 1*l.* 2*s.* 6*d.* only which was in silver. It also appeared that the

prisoner at first gave credit for the 7*l.* 2*s.* 6*d.*, and entered it in the proper book in his own hand, but he afterwards erased that sum, and substituted the 5*l.* 6*s.* 10*d.*, and as he might have paid over every note in question, and either paid over or passed away in change every piece of silver in question, the Judges thought *Rex v. Furneaux* in point. See the case of *Rex v. Furneaux*, Russ. & Ry. 335.

received from Mrs. W.; and if so, that he could not be said to have embezzled any of those specific notes. Bayley, J., told the jury that as in what he paid, he paid only 12*l.* as and for all he had received from Mrs. W., and paid the other 104*l.* as and for monies received of other persons, he ought to be considered as having embezzled six of the notes he received from Mrs. W., because he would then have misapplied six of those specific notes to his own benefit, and to his master's prejudice. And upon a case being reserved, nine Judges, (Best, J., being absent,) thought it an embezzlement from the time of making the false entry. Wood, B., rather thought otherwise; and Abbott, C. J., thought that the point should have been left to the consideration of the jury. (x)

Where the word "feloniously" was omitted before the word "embezzled," but the conclusion was, that the prisoner "feloniously" did steal, "take, &c." the indictment was holden good.

Where an indictment upon the repealed statute 39 Geo. 3. c. 85. charged that the prisoner was employed as a clerk to A., and that, by virtue of his employment, he received from B., on account of his master, 9*l.* 18*s.* 9*d.* without shewing of what monies that sum was made up, and that he fraudulently embezzled and secreted the same, omitting the word *feloniously*; and so it concluded that the jurors say that he did "*feloniously* embezzle, steal, take, and "carry away, &c.;" objection was made, that in the introductory part of the indictment it was not alleged that he did feloniously embezzle, &c., and that therefore the indictment failed to shew that he had committed a felony, and that, unless it was so shewn in the body of the indictment, it was not enough that it was so alleged in the conclusion of it. The Judges, however, considered it to be sufficient that it was stated in the conclusion; and the indictment was holden good. (y)

Trial. County in which the offence may be said to be committed.

Two cases occurred upon the same repealed statute in which questions were raised as to the *county* in which the offence within the statute might be considered as having been so completed as to authorize a trial in such county.

Hobson's case. A denial by a servant, when in the county of Stafford, of his having received money in the county of Salop, was holden to be evidence to shew that the receipt in the county of Salop was with intent to embezzle within the statute; and therefore it was also holden that the trial was properly had in the county of Salop.

In the first of these cases the prisoner was indicted at Shrewsbury, in the county of Salop. It appeared on the trial, that the residence of the master was at Litchfield, in Staffordshire, where the prisoner served him in his trade. That on a Saturday morning, both of them were at Shrewsbury; and that the master having authorised a person, named Beaumont, to collect some debts for him at that place, returned home the same morning, leaving the prisoner at Shrewsbury to receive the money from Beaumont; and bring it to him at Litchfield the same night. The prisoner received the money from Beaumont about noon, and also a letter for his master which had been left at Beaumont's, but which did not relate to the money transaction. He left Shrewsbury soon after, but did not go to his master at Litchfield till the following evening. He then delivered the letter; and being asked about the money, he said he had not received any. A few days after, the master, in consequence of information he had received by letter, charged the prisoner with having received the money, and another servant who had been at Shrewsbury on the Saturday, being present, told the

(x) *Rex v. Hall*, Mich. T. 1821. MS. Bayley, J., and Russ. & Ry. 463.

(y) *Rex v. Crighton*, *cor. Thomson*, B., *Lancaster Sum. Ass.* 1803, and be-

fore the Judges, Mich. T. 1803, MS. Bayley, J., and Russ. & Ry. 62. *Rex v. Johnson*, 2 M. & S. 555.

prisoner that he had seen him receive money, but the prisoner persisted in denying that he had received any. Some time afterwards, the master, having received further intelligence, bid the prisoner go to Shrewsbury to clear himself. On the Saturday following the prisoner went to Beaumont, at his house in Shrewsbury, and desired him to make a search on the left-hand side of the room in which they had been; but no search was made, Beaumont telling him it was of no use to search, as he had received the money from him. The jury having found the prisoner guilty, the case was submitted to the consideration of the twelve Judges, upon two questions; first, Whether, under this statute, an indictment might not be found and tried in the county where the money or goods were received, although there were no evidence of any other fact locally arising within the same county? and, secondly, Whether, if further local proof were necessary, the subsequent conduct of the prisoner at Shrewsbury were not sufficient to obviate the objection, as being an act in furtherance of the purpose of secreting or embezzling? A majority of the Judges were of opinion, that the conviction was right. Lawrence, J., thought, "that embezzling being the offence, there was no evidence of any offence in Shropshire, and that the prisoner was improperly indicted in that county. But the other Judges were of opinion "that the indictment might be in Shropshire where the prisoner received the money, as well as in Staffordshire where he embezzled it by not accounting for it to his master; that the statute having made the receiving property and embezzling it amount to a larceny, made the offence a felony where the property was first taken, and that the offender might therefore be indicted in that or in any other county into which he carried the "property." (z)

In the other case, which occurred shortly afterwards, the indictment charged the prisoner with embezzling the sum of ten shillings, the property of his master James Barker. The evidence was, that the prosecutor Barker, who was a fishmonger in Drury-lane, in the county of Middlesex, sent his servant the prisoner, with some herrings, to a street in Blackfriars-road, in the county of Surry, to a Mrs. Stevens; telling him that he was to receive the sum of ten shillings for them. He went with the herrings about six o'clock in the evening, and delivered them to Mrs. Stevens, who paid him the ten shillings; after which he returned to his master, who asked him if he had brought the money; to which he replied, that he had not, for that Mrs. Stevens had not paid him. His master then paid him his weekly wages (it being on a Saturday), and he went away, being to return on Monday morning as usual: but did not return, nor did he ever account for the money. Upon this evidence it was contended, on the part of the prisoner, that he was only liable to be indicted in the county of Surry, where the money was received: and the jury having found him guilty, this point was reserved for the consideration of the Judges. The opinion of the Judges was afterwards delivered by Lord Alvanley, C. J., who first referred to the foregoing case of Hobson, and then

Taylor's case.
In this case it was holden that if a servant receive money for his master in the county of A., and being called upon to account for it in the county of B. there deny the receipt of it, he may be indicted for the embezzlement in the latter county.

(z) Hobson's case, *Shrewsbury Lent Ass.* 1803, and *East. T.* 1803. 1 *East. P. C. Addenda* xxiv., and *Russ. & Ry.* 56.

proceeded.—“ In the present case no doubt can be entertained. The prisoner, being sent over Blackfriars-bridge into the county of Surry, there received ten shillings for his master. The receipt of that money was perfectly legal, and there was no evidence that he ever came to the determination of appropriating the money to his own use until after he had returned into the county of Middlesex. It was not proved that the money ever was embezzled until the prisoner was in the county of Middlesex. In cases of this sort the nature of the thing embezzled ought not to be laid out of the question. The receipt of money is not like the receipt of an individual thing, where the receipt may be attended with circumstances which plainly indicate an intention to steal, by shewing an intention in the receiver to appropriate the thing to his own use. Thus, if a servant receive a horse for his master, and sell it before he gets out of the county where he first received it, it might be said that he is guilty of the whole offence in that county. But with respect to money, it is not necessary that the servant should deliver over to his master the identical pieces of money which he receives, if he should have lawful occasion to pay them away. In such a case as this therefore, even if there had been evidence of the prisoner having spent the money on the other side of Blackfriar's-bridge, it would not necessarily confine the trial of the offence to the county of Surry. But here there is no evidence of any act to bring the prisoner within the statute until he is called upon by his master to account. When called upon by his master to account for the money the prisoner denied that he had ever received it. This was the first act from which the jury could with certainty say that the prisoner intended to embezzle the money. In this case there was no evidence of the prisoner having done any act to embezzle in the county of Surry, nor could the offence be complete, nor the prisoner be guilty within the statute until he refused to account to his master. We are therefore of opinion, that the prisoner was properly indicted in the county of Middlesex.” (y)

7 Geo. 4. c. 64.
offence begun
in one county
and completed
in another.

Principals in
the second
degree, and
accessories.

It should be observed, that by the late statute, 7 Geo. 4. c. 64. s. 12. where a felony is begun in one county, and completed in another, such felony may be dealt with, inquired of, tried, determined, and punished in any of the said counties, in the same manner as if it had been actually and wholly committed therein.

By s. 61. of the 7 & 8 Geo. 4. c. 29. principals in the second degree, and accessories before the fact, are punishable in the same manner as principals in the first degree; and accessories after the fact (except receivers of stolen property) are liable to be imprisoned for any term not exceeding two years. (z)

(y) Taylor's case, 3 Bos. & Pul. 596.
2 Leach 974. Russ. & Ry. 63.

(z) *Ante* p. 93.

CHAPTER THE EIGHTEENTH.

OF EMBEZZLEMENT BY BANKERS, BROKERS, FACTORS, AND OTHER AGENTS.

SHORTLY after the decision in Walsh's case, which has been noticed in a former part of this work, (a) an act 52 Geo. 3. c. 63. was passed for more effectually preventing the embezzlement of securities for money and other effects, left or deposited for safe custody, or other special purpose, in the hands of bankers, merchants, brokers, attorneys, or other agents. This act was repealed by 7 & 8 Geo. 4. c. 27. but the statute 7 & 8 Geo. 4. c. 29. contains other enactments upon the same subject.

The 7 & 8 Geo. 4. c. 29. s. 49. for the punishment of embezzlements committed by agents entrusted with property, enacts "that if any money, or security for the payment of money, shall be entrusted to any banker, merchant, broker, attorney, or other agent, with any direction in writing to apply such money, or any part thereof, or the proceeds or any part of the proceeds of such security, for any purpose specified in such direction, and he shall, in violation of good faith, and contrary to the purpose so specified, in any wise convert to his own use or benefit, such money, security, or proceeds, or any part thereof respectively, every such offender shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fourteen years nor less than seven years, or to suffer such other punishment by fine or imprisonment, or by both, as the court shall award; and if any chattel or valuable security, or any power of attorney for the sale or transfer of any share or interest in any public stock or fund, whether of this kingdom, or of Great Britain, or of Ireland, or of any foreign state, or in any fund of any body corporate, company, or society, shall be entrusted to any banker, merchant, broker, attorney, or other agent, for safe custody, or for any special purpose, without any authority to sell, negotiate, transfer, or pledge, and he shall, in violation of good faith, and contrary to the object or purpose for which such chattel, security, or power of attorney shall have been entrusted to him, sell, negotiate,

7 & 8 Geo. 4. c. 29.
Agents embezzling money entrusted to them to be applied to any special purpose;

or embezzling any goods or valuable security entrusted to them for safe custody, or for any special purpose, guilty of a misdemeanor.

(a) *Ante*, p. 113.

“transfer, pledge, or in any manner convert to his own use or benefit such chattel or security, or the proceeds of the same, or any part thereof, or the share or interest in the stock or fund to which such power of attorney shall relate, or any part thereof, every such offender shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable, at the discretion of the Court, to any of the punishments which the Court may award, as hereinbefore last mentioned.”

Not to affect trustees or mortgagees ;

The 50th section of the same statute provides “that nothing thereinbefore contained relating to agents shall affect any trustee in or under any instrument whatever, or any mortgagee of any property, real or personal, in respect of any act done by such trustee or mortgagee in relation to the property comprised in or affected by any such trust or mortgage ; nor shall restrain any banker, merchant, broker, attorney, or other agent, from receiving any money which shall be or become actually due and payable upon or by virtue of any valuable security, according to the tenour and effect thereof, in such manner as he might have done if this act had not been passed ; nor from selling, transferring, or otherwise disposing of any securities or effects in his possession, upon which he shall have any lien, claim, or demand entitling him by law so to do, unless such sale, transfer, or other disposal shall extend to a greater number or part of such securities or effects than shall be requisite for satisfying such lien, claim, or demand.”

nor bankers, &c. receiving money due on securities,

or disposing of securities on which they have a lien.

Factors pledging for their own use any goods or documents relating to goods entrusted to them for the purpose of sale, guilty of a misdemeanor.

The 51st section of the same statute enacts “that if any factor or agent entrusted, for the purpose of sale, with any goods or merchandize, or entrusted with any bill of lading, warehouse-keeper’s or wharfinger’s certificate, or warrant or order for delivery of goods or merchandize, shall, for his own benefit, and in violation of good faith, deposit or pledge any such goods or merchandize, or any of the said documents, as a security for any money or negotiable instrument borrowed or received by such factor or agent, at or before the time of making such deposit or pledge, or intended to be thereafter borrowed or received, every such offender shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fourteen years, nor less than seven years, or to suffer such other punishment by fine or imprisonment, or by both, as the court shall award ; but no such factor or agent shall be liable to any prosecution for depositing or pledging any such goods or merchandize, or any of the said documents, in case the same shall not be made a security for or subject to the payment of any greater sum of money than the amount which, at the time of such deposit or pledge, was justly due and owing to such factor or agent, from his principal, together with the amount of any bill or bills of exchange, drawn by or on account of such principal, and accepted by such factor or agent.”

Not to extend to cases where the pledge does not exceed the amount of their lien.

These provisions as to agents shall not lessen any remedy which

The 52d section of the same statute enacts “that nothing in this act contained, nor any proceeding, conviction, or judgment to be had or taken thereupon, against any banker, merchant, broker, factor, attorney, or other agent as aforesaid, shall pre-

“ vent, lessen, or impeach any remedy at law or in equity which
“ any party aggrieved by any such offence might or would have
“ had if this act had not been passed ; but nevertheless the con-
“ viction of any such offender shall not be received in evidence in
“ any action at law or suit in equity against him ; and no banker,
“ merchant, broker, factor, attorney, or other agent as afore-
“ said, shall be liable to be convicted by any evidence whatever as
“ an offender against this act, in respect of any act done by him if
“ he shall at any time previously to his being indicted for such of-
“ fence have disclosed such act, on oath, in consequence of any
“ compulsory process of any court of law or equity in any action,
“ suit, or proceeding, which shall have been *bond fide* instituted
“ by any party aggrieved, or if he shall have disclosed the same
“ in any examination or deposition before any commissioners of
“ bankrupt.”

the party ag-
grieved now
has.

By s. 61. every person who shall aid, abet, counsel, or procure
the commission of any misdemeanor punishable under this act,
shall be liable to be indicted and punished as a principal offender.

Abettors pu-
nishable as
principals.

CHAPTER THE NINETEENTH.

OF EMBEZZLEMENTS OF MINOR IMPORTANCE.

Embezzlements of minor importance.
54 Geo. 3. c. 110. As to embezzlements by pensioners or nurses in *Greenwich* hospital.

SEVERAL enactments are to be found amongst the statutes relating to embezzlements of minor importance, and providing for their punishment by a summary mode of proceeding. Amongst these the 54 Geo. 3. c. 110. s. 1. reciting that several of the pensioners and nurses in the royal hospital for seamen at *Greenwich* had of late pawned, or otherwise disposed of the clothes and other goods delivered to them to wear or use, enacts that such clothes, &c. shall be marked in a particular manner; and makes any person taking in pawn or receiving them, or defacing the marks (which are to be taken as sufficient evidence of property in the commissioners and governors of the hospital), liable to a penalty of ten pounds: and further enacts, that if any pensioner or nurse shall desert, or run away, and carry with them any clothes, &c. belonging to the hospital, they shall, upon conviction, be committed to the gaol of the town &c. where they shall be apprehended, for six calendar months.

55 Geo. 3. c. 137. As to embezzlements by poor persons in work-houses, &c.

The 55 Geo. 3. c. 137. reciting that persons received into public work-houses for the relief of the poor, pawn and dispose of their clothes, and the goods belonging to such work-houses, and that poor persons relieved by having clothes and apparel given them by the officers of parishes frequently pawn and sell the same, and that, by the laws then in force, no punishment could be inflicted on them, or on the persons buying or receiving the same in pawn; first vests the property of such clothes, goods, &c. in the overseers for the time being; and then enacts, that the overseers, or other persons appointed for managing or providing for the poor, may cause all goods, clothes, linen, &c. and things belonging to such overseers or other persons, to be marked with the word "Work-house," and such other marks as they shall think proper, for identifying the parish, &c. by which the same shall have been provided; (a) and that if any person shall knowingly take in pawn, or receive any goods, &c. provided for the use of the poor in a work-house, or given to the poor by the overseers, &c. or any goods, &c. or materials belonging to a work-house; or shall receive or buy any of the provisions provided for the poor of such

(a) By a subsequent part of the section, it is directed that such marks shall not be placed on articles of wearing apparel so as to be publicly visible on the exterior of the same.

work-house, or shall deface the marks, &c. they shall forfeit, for every offence, not exceeding five pounds nor less than one pound, upon conviction before a justice. And it further enacts, that if any persons shall desert, or run away from any workhouse, and carry with them any clothes, &c. or things as aforesaid, such persons, being lawfully convicted before any justice of the peace, shall be forthwith committed to gaol or to the house of correction for three calendar months. And it provides that the marks, &c. on such things (being duly authenticated) shall be sufficient evidence of property in the overseers, or other persons appointed as aforesaid. (b)

An act for the warehousing of goods, 6 Geo. 4. c. 112. s. 39. enacts, that if it shall at any time happen that any embezzlement, waste, spoil, or destruction, shall be made of or in any goods or merchandize which shall be warehoused in warehouses under the authority of that act, by or through any wilful misconduct of any officer or officers of customs or excise, such officer or officers shall be deemed guilty of a misdemeanor, and shall, upon conviction, suffer such punishment as may be inflicted by law in cases of misdemeanor. (c)

6 Geo. 4. c. 112. embezzling, &c. warehoused goods.

In a late publication a precedent is given of an indictment against a surveyor of highways, for using materials, obtained for repairing the highways, upon his own premises, for employing the public labourers on his own grounds, and for embezzling the gravel and other materials which had been procured for the parish. (d) This indictment does not appear to have been framed upon the provisions of any statute; but to have charged the offence against the defendant as a misdemeanor at common law; laying the acts to have been done by colour of his office, and in dereliction of his duty as surveyor of the highways. (e)

Embezzlement by a surveyor of the highways of materials procured for repairing them at the expence of the parish.

(b) 55 Geo. 3. c. 137. s. 2.

(c) And in case of a conviction the owner is to be repaid for his loss by the commissioners of excise.

(d) 3 Chit. Crim. L. 666. where it is said, in note (p), that this indictment

was procured from the crown office, and was used in 1799 against one Robinson.

(e) See vol. I. p. 138. *et sequ.* as to offences by persons in office.

CHAPTER THE TWENTIETH.

OF EMBEZZLEMENT BY OFFICERS AND SERVANTS OF THE BANK OF ENGLAND, AND BY PUBLIC OFFICERS.

Embezzlements by officers and servants of the Bank of England.

15 Geo. 2. c. 13. s. 12. Any officer, &c. of the said company being entrusted with or having any bill, &c. or other effects, and secreting the same, is made guilty of felony without benefit of clergy.

SUBSEQUENTLY to the transaction in the case of Waite, (a) but prior to the decision of the Judges upon it, the statute 15 Geo. 2. c. 13. was passed; the twelfth section of which relates to embezzlements by officers and servants of the Bank of England.

It enacts, "that if any officer or servant of the said company " being entrusted with any note, bill, dividend-warrant, bond, " deed, or any security, money, or other effects belonging to the " said company, or having any bill, dividend-warrant, bond, " deed, or any security or effects of any other person or persons, " lodged or deposited with the said company, or with him as an " officer or servant of the said company, shall secrete, imbezil, or " run away with any such note, bill, dividend-warrant, bond, deed, " security, money or effects, or any part of them; every officer or " servant so offending, and being thereof convicted in due form of " law, shall be deemed guilty of felony, and shall suffer death as a " felon, without benefit of clergy."

The same provisions are repeated in the 35 Geo. 3. c. 66. s. 6., and 37 Geo. 3. c. 46. s. 6. (which makes certain annuities, created by the parliament of Ireland transferrable, and the dividends payable at the Bank of England) with respect to effects deposited in pursuance of those acts. And there is a similar provision in the 24 Geo. 2. c. 11. s. 3. with respect to the officers and servants of the South Sea company.

The 15 Geo. 2. c. 13. s. 12. is not in any respect repealed by the 39 Geo. 3. c. 85.

It appears to have been at one time supposed that the general words of a subsequent statute 39 Geo. 3. c. 85. mentioned in a preceding chapter, (b) but now repealed, might be considered as so covering the offences mentioned in the 15 Geo. 2. c. 13. s. 12. as to do away the capital part of the punishment therein prescribed. (c) But the point having been brought under the consideration of the twelve Judges, they were unanimously of opinion that nothing contained in the 39 Geo. 3. c. 85. operated as a repeal of any part of the 15 Geo. 2. c. 13. (d)

(a) *Ante*, 204.

(b) *Ante*, 207, *et sequ.*

(c) See the argument of *Erskine*, for the prisoner, in Aslett's second case, 2 Leach 965: and the doubt is mentioned in 2 East P. C. c. 16.

s. 19. p. 579; but sufficient reasons are there given why the statute, 39 Geo. 3. c. 85. had not such an operation.

(d) Aslett's second case, 2 Leach 970. Russ. & Ry. 67.

It seems that a note once cancelled by the bank is not within this statute of 15 Geo. 2., a note, security, or effects of the bank; or at least that a person only employed to call over the sums and numbers from the cash-book, though he has access to the "file" of cancelled notes, cannot be found guilty for taking a note from the file as a person intrusted with such note. The prisoner was indicted as a servant intrusted with a note of the governor and company for embezzling it. It appeared that he took it off a cancelled file to which he and many other clerks had access, and that he was the person who read from the cash-book the sums and dates to check the cancelled account, and there was evidence that his motive was to get a reward from the bank by shewing how this fraud could be committed. The recorder saved the points whether the cancelled note came within the description in 15 Geo. 2., of a note, security, or effects of the bank; and also whether, in case it did, the prisoner was so entrusted with the possession of it as to be within the statute. The conviction was held bad, on the ground that it did not appear by the facts, as stated, that the prisoner was a person *entrusted* with the cancelled note, although he had access to it. (e)

An indictment on this statute was holden bad in charging the prisoner with embezzling "certain bills, commonly called *exchequer bills*," when the person who signed the bills on the part of government was not legally authorized so to do. It appeared that the bills in question were issued under the statute 43 Geo. 3. c. 5. which contained a proviso that every such bill should be signed by the auditor of the exchequer, or in his name, by any person duly authorized by him to sign the same with the approbation of three or more of the lords commissioners of the treasury, in writing under their hands; but which proviso had not been complied with, inasmuch as the authority of a Mr. Jennings, by whom the bills were, in fact, signed, had not been properly renewed. Upon this it was objected, on behalf of the prisoner, that the bills in question were not legal exchequer bills; and that, as the indictment in every count, averred the instruments alleged to have been embezzled to be exchequer bills, the allegation was not proved, and the prisoner must be acquitted. And the court were of opinion that the objection was good; that as the formalities required by the statute, by which these bills were created, had not been complied with, they were not good exchequer bills; and that the circumstances of the Bank of England having purchased them as exchequer bills, and of the bills having in that character answered the purposes for which they were originally created, could have no effect in this case, as they could not alter the nature of the fact. (f)

But the prisoner was detained; and shortly afterwards another indictment was preferred against him, upon which he was convicted. This indictment described the exchequer bills in question

It seems that a note once cancelled at the Bank is not a note, &c. within the statute 15 Geo. 2. c. 13. s. 12. The person offending within this act must be a person *entrusted*, &c.

Aslett's (first) case. The indictment charged the prisoner with embezzling "certain bills, commonly called *exchequer bills*;" and it was holden bad, on its appearing that the bills had been signed by a person not legally authorized to sign them.

Aslett's (second) case. In this case it was holden

(e) *Rex v. Bakewell*, November 1802. MS. Bayley, J., and Russ. & Ry. 35. The case is reported in 2 Leach 943, and noticed by Le Blanc, J., 2 Leach 947. The cancelling was

effected merely by a punch through.

(f) Aslett's (first) case, *cor.* Macdonald, C. B., Rooke, J., and Lawrence, J., O. B., 1803. 2 Leach 954.

that exchequer bills purchased by the Bank for a good consideration, but signed in the name of the auditor of the exchequer by a person not legally authorized, are "securities," or, at least, "effects," within the meaning of the 15 Geo. 2. c. 13. s. 12. and that a servant of the bank embezzling such bills, may be convicted of felony under that statute.

as *effects* belonging to the governor and company of the Bank of England; stating the effects, in the first count, as paper writings, purporting to be exchequer bills; in the second count, as certain papers upon the credit whereof the bank had advanced a large sum of money; and in the third count, as certain papers, &c. purporting to be bills commonly called exchequer bills; and in other counts, the exchequer bills in question were called *securities* instead of effects. It was objected by the counsel for the prisoner, before any evidence was called on the part of the prosecution, that, as it had been determined, by his acquittal on the former indictment, that the papers he was charged with having embezzled were not exchequer bills at the time of the embezzlement, he could not be again charged with having embezzled the same papers, as being *effects* belonging to the Bank of England; he having committed no other act of embezzlement than that contained in the former indictment; for though by a remedial statute, 43 Geo. 3. c. 60. these defective papers had been rendered good and valid exchequer bills for *civil purposes*, yet, that statute having impliedly declared that these papers were, previously to the passing it, mere waste papers, and of no value at the time the embezzlement of them took place, it could not *ex post facto* make them valuable *effects*, within the statute 15 Geo. 2. c. 13. s. 12; which word *effects*, it was contended, could apply only to things in themselves of intrinsic value. But Le Blanc, J. observed, that the word "securities" was used in the statute as well as the word "effects;" which shewed that the legislature intended that the statute should extend to other kinds of property than securities; the word effects being of a larger and more comprehensive meaning than the word securities: and he directed that the trial should proceed. The facts of the case were then proved; and the jury having found the prisoner guilty, the case was reserved for the consideration of the twelve Judges. The important question submitted to them was, whether, on the true construction of the statute 15 Geo. 2. c. 13. s. 12., these papers, which were issued as exchequer bills, did, in point of law, come within the words "effects, or securities," meant to be described in the act of parliament? After able argument by counsel, and much consideration by the Judges, at different conferences, the result of their mature deliberation was communicated by Lord Alvanley, C. J., who stated that the Judges had not been unanimous upon this point, but that a majority of them were of opinion that the bills, or papers, were "effects, or securities," within the true meaning of the act, and that the prisoner was properly convicted. After alluding to the great object of the legislature, in giving protection and security to the Bank of England, his lordship proceeded to state that the papers in question were papers of value; that though they might not, on the face of them, be of any descriptive legal value, yet that they carried about them such a consequence, at least, as might make their preservation of infinite importance to the bank; that the government of the country was pledged to pay them even as they were, the holders of them having as strong a claim upon the justice of the government for such payment as if they were

technically correct in all their parts; and that they were, therefore, in the true meaning of the word, securities which might be rendered available to any persons having the legal right to them. He then observed, that the papers in question were not less to be deemed *effects*; which word was a very large and general term, and confined to no particular description of property, either in specie, or value; and was, therefore, probably inserted in the act, studiously, when the legislature were placing a special guard around the bank; and also that the offence of embezzling the effects, or securities, mentioned in the act, was not made larceny, where some value must attach on the thing taken, but was created a felony, which induced no necessity for any value being ascertained. He then put several cases to shew that the papers in question were *effects*; and after stating that the Judges had not found themselves driven to the extreme length of construing the word "effects" to extend to such trifling articles as the stumps of old pens, or a piece of blotting paper (an absurdity which had been supposed in argument); he said that their judgment only determined that the words of the act necessarily extended to such securities, or effects, as were entrusted to the officers and servants of the bank; and that the bills in question came under that description. (g)

A recent statute, 50 Geo. 3. c. 59. has been passed for the more effectually preventing the embezzlement of money or securities for money belonging to the public, by any collector, receiver, or other person entrusted with the receipt, care, or management thereof; and it makes persons offending by such embezzlement guilty of a misdemeanor.

Of embezzlements of the public monies by public officers, collectors, &c.

The first section of the statute enacts, "that if any person or persons to whom any money or securities for money shall be issued for public services, shall embezzle such money, or in any manner fraudulently apply the same to his own use or benefit, or for any purpose whatever except for public services, every such person so offending, and being thereof duly convicted according to law, in any part of the united kingdom, shall be adjudged guilty of a misdemeanor, and shall be sentenced to be transported beyond the sea, or to receive such other punishment as may by law be inflicted on persons guilty of misdemeanors, and as the court before which such offenders may be tried and convicted shall adjudge."

50 Geo. 3. c. 59. s. 1. Any person embezzling or fraudulently applying money issued to them for the public services, to be adjudged guilty of a misdemeanor, and punished by transportation, &c.

The second section enacts, "that if any such officer, collector, or receiver so entrusted with the receipt, custody, or management of any part of the public revenues, shall knowingly furnish false statements or returns of the sums of money collected by him or entrusted to his care, or of the balances of money in his hands or under his controul, such officer, collector, or receiver so offending, and being thereof convicted, shall be adjudged guilty of a misdemeanor, and shall be adjudged to suffer the punishment of fine and imprisonment, at the discretion of the court, and be rendered for ever incapable of holding or enjoying any office under the crown."

50 Geo. 3. c. 59. s. 2. Any officer, collector, &c. entrusted with the receipt or management of the public revenues, and furnishing false statements; to be adjudged guilty of a misdemeanor, and punished by fine and imprisonment, &c.

(g) Aslett's (second) case, O. B. 1803 and 1804, 1 New Rep. 1. 2 Leach 958., and Russ. & Ry. 67. As to another

point decided in this case, namely, that the 15 Geo. 2. c. 13. is not repealed by 39 Geo. 3. c. 85., see *ante*, 224.

CHAPTER THE TWENTY-FIRST.

OF LARCENY AND EMBEZZLEMENT BY PERSONS IN THE POST-OFFICE; OF STEALING LETTERS; AND OF SECRETING BAGS OR MAILS OF LETTERS.

THE statutes relating to these offences are, the 5 Geo. 3. c. 25. the 7 Geo. 3. c. 50. the 42 Geo. 3. c. 81. and the 52 Geo. 3. c. 143. And the offences appear to consist,—I. In the embezzlement and stealing of letters or their contents by persons employed in the Post-office; II. In the destroying letters, or embezzling the postage of them, by persons so employed; III. In embezzling or purloining of printed proceedings in parliament, newspapers, &c. by persons so employed. IV. In the stealing of letters by persons not employed in the Post-office; and V. In the secreting, &c. letters, or bags, or mails of letters, which may have been found or picked up.

Embezzlement and stealing of letters or their contents by persons employed in the Post-office.

I. The embezzlement and stealing of letters, or their contents, by persons employed in the Post-office, were made felonies without benefit of clergy, by the statutes 5 Geo. 3. c. 25. s. 17. 7 Geo. 3. c. 50. s. 1. and 42 Geo. 3. c. 81. s. 1.; but it does not seem necessary to refer particularly to those statutes at the present time, as their provisions, in respect to the offences in question, appear to be included in the more recent statute 52 Geo. 3. c. 143. s. 2. which was passed in order to reduce into one statute those provisions contained in any revenue laws then in force, whereby the penalty of death was imposed for any act done in breach of or in resistance to those laws.

52 Geo. 3. c. 143. s. 1. extends clergy to all offences in breach of the revenue laws, except such as are deprived of clergy by this act.

This statute enacts, “that in all cases where any act to be done or committed after the passing of this act in breach of or in resistance to any part of the laws for collecting his majesty’s revenue in Great Britain would by the laws now in force subject the offender to suffer death as guilty of felony without benefit of clergy by virtue of the said laws or any of them such act so to be done or committed shall be deemed and taken to be felony with benefit of clergy and punishable only as such unless the same shall also be declared to be felony without benefit of clergy by this act.” (a)

52 Geo. 3. c. 143. s. 2.

The statute then enacts, “that if any deputy, clerk, agent,

“ letter-carrier, post-boy, or rider, or any other officer or person
 “ whatsoever employed by or under the Post-office of Great Bri-
 “ tain, in receiving, stamping, sorting, charging, carrying, con-
 “ veying or delivering letters or packets, or in any other business
 “ relating to the said office, shall secrete, embezzle, or destroy
 “ any letter or packet, or bag or mail of letters with which he or
 “ she shall have been entrusted in consequence of such employ-
 “ ment, or which shall in any other manner have come to his or
 “ her hands or possession whilst so employed, containing the whole
 “ or any part or parts of any bank note, bank post bill, bill of
 “ exchange, exchequer bill, South Sea or East India bond, divi-
 “ dend warrant, either of the Bank, South Sea, East India, or
 “ any other company, society, or corporation, navy or victualling,
 “ or transport bill, ordnance debenture, seaman’s ticket, state lot-
 “ tery ticket or certificate, bank receipt for payment on any loan,
 “ note of assignment of stock in the funds, letter of attorney for
 “ receiving annuities or dividends, or for selling stock in the
 “ funds, or belonging to any company, society, or corporation,
 “ American provincial bill of credit, goldsmith’s or banker’s letter
 “ of credit, or note for or relating to the payment of money or
 “ other bond or warrant, draft, bill, or promissory note whatso-
 “ ever for the payment of money ; or shall steal and take out of
 “ any letter or packet with which he or she shall have been so en-
 “ trusted or which shall have so come to his or her hands or posses-
 “ sion, the whole or any part or parts of any such bank note, bank
 “ post bill, bill of exchange, exchequer bill, South Sea or East India
 “ bond, dividend warrant, either of the Bank, South Sea, East
 “ India, or any other company, society, or corporation, navy or
 “ victualling or transport bill, ordnance debenture, seaman’s ticket,
 “ state lottery ticket or certificate, bank receipt for payment of
 “ any loan, note of assignment of stock in the funds, letter of at-
 “ torney for receiving annuities or dividends, or for selling stock
 “ in the funds, or belonging to any company, society, or corpora-
 “ tion, American provincial bill of credit, goldsmith’s or banker’s
 “ letter of credit, or note for or relating to the payment of money,
 “ or other bond or warrant, draft, bill, or promissory note what-
 “ soever for the payment of money ; every person so offending,
 “ being thereof convicted, shall be adjudged guilty of felony, and
 “ shall suffer death as a felon, without benefit of clergy.”

Persons em-
 ployed in the
 Post-office se-
 creting, em-
 bezzling, &c.
 any letter, &c.
 containing
 any bank-
 note, bill, &c.
 or any part
 thereof, or
 stealing the
 same out of
 any letter, &c.
 made guilty
 of felony with-
 out benefit of
 clergy.

The 4th section of the statute relates to aiders and abettors, and to accessories ; and enacts, “ that if any person shall counsel, com-
 “ mand, hire, persuade, procure, aid or abet any such deputy,
 “ clerk, agent, letter carrier, post-boy or rider, or any officer or
 “ person whatsoever employed by or under the said office, in re-
 “ ceiving, stamping, sorting, charging, carrying, conveying or
 “ delivering letters or packets, or in any other business relating to
 “ the said office, to commit any of the offences hereinbefore men-
 “ tioned, or shall, with a fraudulent intention, buy or receive the
 “ whole or any part or parts of any such security or instrument
 “ as hereinbefore described, which shall have been contained in,
 “ and which, at the time of buying or receiving thereof, he shall
 “ know to have been contained in any such letter or packet so
 “ secreted, embezzled, stolen or taken by any deputy, clerk, agent,

52 Geo. 3. c.
 143. s. 4.
 Aidors, abet-
 tors, and ac-
 cessories
 made guilty of
 felony without
 benefit of
 clergy : and
 they may be
 tried before
 or after the
 principal
 felon.

"letter carrier, post-boy or rider, or any other officer or person so employed as aforesaid, or which such person so buying or receiving as aforesaid shall, at the time of buying or receiving thereof, know to have been contained in and stolen and taken out of any letter or packet stolen and taken from or out of any mail or bag of letters sent and conveyed by such post, or from or out of any post-office or house or place for the receipt or delivery of letters or packets, or bags or mails of letters sent or to be sent by such post; every person so offending, and being thereof convicted, shall be adjudged guilty of felony, and shall suffer death as a felon, without benefit of clergy, and shall and may be tried, convicted and attainted of such felony, as well before as after the trial or conviction of the principal felon; and whether the said principal felon shall have been apprehended or shall be amenable to justice or not."

The 52 Geo. 3. c. 143. relates expressly to the embezzling, &c. of any *part* of a bank-note, &c.

This statute, 52 Geo. 3. c. 143. relates expressly to the embezzling and stealing the whole or *any part* of a bank note, &c. The former statute, 7 Geo. 3. c. 50., was not equally extensive; but it was holden that a letter carrier secreting half a bank note in one letter on one day, and the other half in another letter on another day, was guilty of a secreting within that statute. (b) And the 42 Geo. 3. c. 81. s. 2. extended the provisions of the 7 Geo. 3. c. 50. to the protection of any *parts* of the securities or instruments therein-mentioned.

Construction of the similar provisions of the 7 Geo. 3. c. 50.

Some of the cases decided upon the 7 Geo. 3. c. 50. may be useful in the construction of the similar provisions of the 52 Geo. 3. c. 143.

It was holden upon an indictment on the 7 Geo. 3. c. 50. charging the prisoner, as a servant to the Post-office, with embezzling a letter containing a bill of exchange, that it was not necessary to prove that he had taken the oath required by the statute 9 Ann. c. 10. s. 41. (c) It was objected, that as he had not taken the oath, he could not be considered as a legal servant to the Post-office; but the objection, being submitted to the consideration of the twelve Judges, was over-ruled. (d)

Willoughby's case. Holden that a bill of exchange might be laid as a warrant for the payment of money within the statute 7 Geo. 3. c. 50.

It was decided on the statute 7 Geo. 3. c. 50. that a bill of exchange might be laid in the indictment as a warrant for the payment of money. The prisoner, a clerk employed in the post-office at Birmingham, was charged in the indictment with stealing from a letter a certain *warrant for the payment of money*; and it was objected on his behalf that the instrument in question was not, according to the true construction of the statute, a warrant

(b) *Rex v. Moore*, O. B. 1792, 2 Leach 575. 2 East. P. C. c. 16. s. 22. p. 582.

(c) That statute enacts, that no person shall be capable of exercising any employment relating to the Post-office, &c. unless he shall have first taken an oath therein mentioned. But no penalty is annexed to the omission.

(d) *Clay's case*, *York Lent Ass.* 1784,

East. T. 1784, 2 *East. P. C. c.* 16. s. 21. p. 580. 1 *Leach* 3. note (a). The prisoner was acquitted on one indictment, on the supposed validity of the objection, that he had not taken the oath: but other indictments having been preferred against him for similar offences, it was thought necessary to take the opinion of the Judges on the point.

for the payment of money, but a post-bill, note, or bill of exchange. (e) The prisoner having been found guilty, this point was submitted to the consideration of the Judges. Three of the Judges doubted, at first, whether the instrument could be considered as a warrant within the meaning of the statute; for as the statute enumerated specific things, and expressly mentioned bills of exchange, they thought that the words "other warrant" must mean something besides a bill of exchange, (such as warrants from some of the public boards for payment of money) but they afterwards admitted that the case could not be distinguished from a case of forgery, where an indictment laid in the same manner was holden good; (f) and they ultimately appeared to be satisfied as to the indictment in the present case. The other nine Judges were clear, that the indictment was well laid; as the instrument, though it was a bill of exchange, was also a warrant for the payment of money, that it was a voucher to the bankers, or drawers, if genuine, for the payment, and that it might also have been laid as a draft. (g)

In a case where the indictment charged the prisoner, as a person employed in sorting letters in the Post-office, with secreting a letter, containing a draft purporting to be drawn in London, but which appeared upon the evidence to have been drawn at Maidstone, *without having any stamp* upon it, contrary to the 31 Geo. 3. c. 25. s. 4., it was holden that this was not a draft for the payment of money within the statute 7 Geo. 3. c. 50. s. 1. The objections submitted on behalf of the prisoner at the trial were, first; that a draft on a banker or bill of exchange not stamped pursuant to the direction of the statutes 31 Geo. 3. c. 25. and 37 Geo. 3. c. 136. could not be received in evidence for any purpose; but if, on the authority of decided cases, it should be thought admissible; then, secondly, that such a draft or bill of exchange, if it could be so called, could not be the subject of larceny, inasmuch as it could not be of any value whatever; and, thirdly, that being so invalid, it could not be considered as a security for the payment of money within the statute 2 Geo. 3. c. 25. s. 3. the secreting of which, when sent in a letter, came within the meaning of the 7 Geo. 3. c. 50. The note was, however, received in evidence by the court; and the jury found the prisoner guilty. But the case was reserved for the consideration of the twelve Judges, and argued before them at considerable length. It was contended, on behalf of the prisoner, that the paper writing in question, purporting to be a draft for payment of money, was not in law a draft for payment of money, within the 7 Geo. 3. c. 50., inasmuch as it was not stamped pursuant to the stamp acts; (h) and that, being unstamped, it was

Pooley's case. Where a draft purporting to be drawn in London, but in fact drawn at Maidstone, *without any stamp* on it, contrary to a stamp act, was taken by a servant of the Post-office out of a letter entrusted to his care, it was holden that this was not a draft for the payment of money within 7 Geo. 3. c. 50.

(e) It was in the following form:—
Post Bill.

No. 6127.

Birmingham, 13th Feb. 1783.
Sir Wm. Lemon Bt. and Co. bankers
London, pay 5 Gs. to Mr. Richd.
Moore or bearer, on dem^d value rec^d.
Robt. Coales.

Five Gs.
Encl. R. Moore.

As to this being a post bill, it was observed, that the words of the act were "*Bank post bill*."

(f) Shepherd's case, Mich. T. 1781.
2 East. P. C. c. 16. s. 22. p. 582.

(g) Willoughby's case, *Warwick*
Lent Ass. 1783, East. T. 1783. 2 East.
P. C. c. 16. s. 22. p. 581.

(h) 31 Geo. 3. c. 25. and 37 Geo. 3.
c. 136.

not a chose in action, the stealing of which could be the subject of larceny within the statute 2 Geo. 2. c. 25. s. 3. (i) for without a stamp it was of no value. That the statute 7 Geo. 3. c. 50. either creates a new felony, or takes away the benefit of clergy from an old offence; and that, in either case, the instrument secreted or stolen must be of some value; whereas the draft in question was of no legal value, being a draft drawn contrary to the directions of the legislature, who by the stamp act had declared that a draft so drawn should not "be pleaded or given in evidence in any court, or admitted in any court to be good, useful, or available, in law or equity." (k) And several cases of forgery were cited, in which it had been holden, that a forged order for the payment of money, or delivery of goods, must be such as, if genuine, would be compulsory, and might be legally enforced. (l) It was also argued, that even if the paper writing in question were admissible in evidence on this indictment, though not stamped according to the directions of the statute, yet that it did not prove the allegation in the indictment that the said draft "then and there was in force, and the property of, &c., and the sum of money made payable and secured thereby unsatisfied;" that this allegation was material and not proved, but on the contrary absolutely negated by the evidence; inasmuch as, for want of a stamp, the writing in question appeared to be an instrument which could not be enforced, which could not impart any property in the drawer, which could not secure any sum of money, and on which of course nothing could be due and unsatisfied. For the crown it was contended, that though a draft not stamped cannot be given in evidence in any action brought thereon to recover its value, yet that it is not void and of no effect to all intents and purposes; and cases were cited in which it was decided that a forged draft drawn on unstamped paper may be given in evidence, not only on an indictment for forgery, but in an action for the recovery of the penalty. (m) That though in case the indictment had been framed for larceny, on the statute 2 Geo. 2. c. 25. (n) it might have been questionable whether the prisoner could have been legally convicted, as that statute does not mention "a draft for the payment of money" *eo nomine*, and as the instruments therein enumerated are such as, by retaining a value, may be legally in force for the money due and unsatisfied upon them; yet in this case, as the indictment was framed entirely upon the statute 7 Geo. 3. c. 50. it charged an offence quite different and dis-

(i) *Ante*, 143.

(k) 31 Geo. 3. c. 25.

(l) Mitchell's case, Fost. 119.—Locket's case, 1 Leach 94. 2 East. P. C. c. 19. s. 38. p. 940. Williams's case 1 Leach 114. 2 East. P. C. c. 19. s. 37. p. 937. Eller's case, 1 Leach 323. 2 East. P. C. c. 19. s. 37. p. 938. Clinch's case, 1 Leach 540. 2 East. P. C. *ibid.* and Moffatt's case, 1 Leach 431. 2 East. P. C. c. 19. s. 45. p. 954.

(m) Hawkeswood's case, 1 Leach

257. 2 East. P. C. c. 19. s. 45. p. 955. Reculist's case, 2 Leach 703. 2 East. P. C. c. 19. s. 45. p. 956. And it was observed that Moffatt's case, *ante*, note (l) proceeded upon the words of 15 Geo. 3. c. 51. and 17 Geo. 3. c. 30. which enact, that all notes drawn contrary to the directions of those acts shall be void. For the cases on this subject see *post*, Chap. on Forgery.

(n) *Ante*, 143.

tinct from that of stealing a chose in action under the 2 Geo. 2. c. 25.; the object of the legislature in passing the later statute 7 Geo. 3. c. 50. being to secure the conveyance of every instrument, whether immediately valuable or not, that might be sent by the post, and to protect the revenue arising from the postage of letters; and the two statutes being therefore made with different objects in view, and not *in pari materia*. And with respect to the objection, that the allegation in the indictment that the draft "was *in force*" was not proved, it was answered that it was an unnecessary allegation, and need not be proved. In the course of the argument Lord Eldon, C. J., observed, that the legislature had not made it felony to secrete any letter, but to secrete any letter containing any of the particular securities specified in the statute. (o) The Judges were all of opinion that the conviction was wrong; that the draft not being stamped was of no value, nor in any way available, and therefore was not a bill or draft within the act. (p)

In a case where the letter embezzled was described as having contained several notes, it was held to be sufficient to prove that it contained any one of them; and also that if the instrument is upon the face of it, a note, the maker's signature need not be proved. In the same case it was also held, that upon an indictment stating the prisoner to have been employed in two branches of the post-office, proof of his having been employed in either is sufficient. (q)

A case has been mentioned in a former part of this work, (r) where upon an indictment on the first section of the statute 7 Geo. 3. c. 50. it was holden, that a servant of the Post-office, employed as a facer of letters, who secreted a letter containing the *paid-notes* of a country bank, which were in the course of being conveyed from the London bankers, who paid them, to the country bankers, for the purpose of being re-issued, had committed an offence within the statute; as the notes, though not re-issued, were considered as retaining the character, and falling within the description of promissory notes. (s)

Upon an indictment on the 7 Geo. 3. c. 50. the charge was laid against the prisoner, in the first and third counts, as a person "employed in sorting and charging letters in the Post-office;" and in the second and fourth counts as a person "employed in "the business relating to the General Post-office;" and upon the evidence it appeared, that the prisoner was only a sorter and not a charger of letters, whereupon the jury were directed to convict him on the second and fourth counts only. But an objection was afterwards taken that, as the prisoner had been acquitted on the counts which charged him as a sorter and charger, and did not

Ranson's case. Secreting a letter containing the *paid notes* of a country bank, holden to be within the statute 7 Geo. 3. c. 50.

Shaw's case. A person indicted in two counts as a charger and sorter of letters, and in two other counts, as "a "person employed in "the Post-office," and

(o) And in 2 Leach 909. note (a), it is observed, that there does not appear to be any clause in either of the more recent statutes 42 Geo. 3. c. 81. or 52 Geo. 3. c. 143. by which a servant of the Post-office, who is entrusted with a letter, may be punished for secreted, embezzling, or stealing such letter, unless it contains some, or one, or part of the securities mentioned in

the statutes.

(p) Pooley's case, 2 Leach 887. 3 Bos. & Pull. 311. Russ. & Ry. 12.

(q) Rex v. Ellins, Mich. T. 1810, Russ. & Ry. 188.

(r) *Ante*, 147.

(s) Ranson's case, 2 Leach 1090, Russ. & Ry. 232. And see Clarke's case, *ante*, 145, 146.

acquitted on the counts in which he was indicted as a charger and sorter, because it appeared that he was only a sorter, cannot be convicted on the other two counts.

Dawson's case. Points as to the description of the letter, and of the bills secreted.

Evidence.

Destroying letters or embezzling the postage of them by persons employed in the Post-office.

5 Geo. 3. c. 25. s. 19. Persons employed to receive the postage of let-

appear to be a person employed by the Post-office in any other business but that of sorting, which is one of the employments particularly specified in the statute, he could not be convicted on the second and fourth counts. And this objection being submitted to the consideration of the Judges, they thought the objection valid : but they inclined to think that the jury might have convicted the prisoner on the first and third counts, by a special finding that he was a sorter only. (t)

Where an indictment upon the 7 Geo. 3. c. 50. s. 1. charged the prisoner, as a person employed in the business of the Post-office as a post-boy, &c. with secreting, &c. certain bills of exchange, contained in a letter sent by the post, which came to his possession in his said employment, it was holden not to be a variance, to describe such letter in the indictment as one "to be delivered to Messrs. B., N., and H.;" as the word *Messrs.* was frequently added to their address in the direction of letters, and other papers received in business, though the parties themselves, in drawing or indorsing bills, making out invoices &c. wrote B., N., and H., without ever adding *Messrs.* as part of their description. And it was considered that the acceptance of bills, directed to them in that manner, would be a using of that firm. It was also holden to be sufficient to allege, in part description of the bills so secreted and stolen, that they were subscribed by A. and B., without saying that they were drawn or made by them. (u)

Though the post-office marks in town or country, proved to be such, are evidence that the letters, on which they appear, were in the office to which those marks belong at the dates which they specified; yet a mark of double postage having been paid on a letter is not of itself evidence that the letter contained an enclosure. Upon a case reserved, the Judges held a conviction wrong, on the ground that there was not sufficient evidence of a double letter having been put into the Post-office; the clerk who put it into the office, paid the postage, and wrote "post paid 2s.," not having been called. (x)

II. The offences of destroying letters, and embezzling monies received for the postage of them, are made punishable by the 5 Geo. 3. c. 25. s. 19. and the 7 Geo. 3. c. 50. s. 3.

The first of these statutes 5 Geo. 3. c. 25. s. 19. enacts, "that
"if any deputy, clerk, agent, letter carrier, or other servant, appointed, authorized and entrusted, to take in letters or packets,
"and receive the postage thereof, shall embezzle, or apply to his,
"her, or their own use any money or monies by him, her or them
"received with such letters or packets, for the postage thereof;
"or shall burn or otherwise destroy, any letter or letters, packet

(t) Shaw's case, O. B. 1771. cor. the Recorder, and Mich. T. 12 Geo. 3. 2 Black. Rep. 789. 2 East. P. C. c. 16. s. 21. p. 580. 1 Leach 79.

(u) Dawson's case, cor. Chambre, J., Lancaster Spr. Ass. 1801, and before the Judges, Trin. T. 1801. 2 East. P. C. c. 16. s. 39. p. 605.

(x) Rex v. Plumer, Hil. T. 1814. Russ. & Ry. 264. It seems to have been considered also in this case, that though a letter found upon the prisoner might properly be read, it was not evidence of the facts stated in it, and that such facts must, therefore, be proved by other evidence.

"or packets, by him, her or them, so taken in or received; or
"who, by virtue of their respective offices, shall advance the rates
"upon letters or packets sent by the post, and shall not duly ac-
"count for the money by him, her or them received for such
"advanced postage; every such offender or offenders, being thereof
"convicted as aforesaid, shall be deemed guilty of felony."

The subsequent statute, 7 Geo. 3. c. 50. s. 3. does not profess, in terms, to repeal the foregoing clause, though it varies from it in some respects very materially. It enacts, "that if any deputy, clerk, agent, letter-carrier, officer, or other person whatsoever, employed or hereafter to be employed in any business relating to the post-office, shall take and receive into his, her or their hands or possession any letter or letters, packet or packets, to be forwarded by the post, and receive any sum or sums of money therewith for the postage thereof, shall burn or otherwise destroy any letter or letters, packet or packets by him, her or them, so taken in or received; or if any such deputy, clerk, agent, letter-carrier, officer or other person whatsoever, so employed or hereafter to be so employed, shall advance the rate or rates of postage upon any letter or letters, packet or packets, sent by the post, and shall secrete, and not duly account for the money by him, her or them received for such advanced postage; every such offender or offenders, being thereof convicted as aforesaid, shall be deemed guilty of felony."

ters, &c. and embezzling the postage, burning the letters, &c. and persons advancing the rates of postage, made guilty of felony.

7 Geo. 3. c. 50. s. 3. Persons employed in the Post-office, and receiving any letter, &c. and money for the postage and burning the letter, &c. and persons advancing the postage, &c. made guilty of felony.

In a case where the prisoner was indicted for secreting a letter, containing a bank-note for ten pounds, the jury found specially that the prisoner was an officer employed in the business of the post-office, in stamping and facing letters; that he secreted the letter in question, while in the execution of his office, without opening it, and without knowing that the ten pound bank-note was contained in it; and that he secreted it with intent to defraud the king of the postage thereof, which had been paid. The determination of the Judges, upon this case, was never communicated. (y) But it is suggested that the case seems to fall within one of the offences provided for by the 5 Geo. 3. c. 25. s. 19.; though some difficulty might have arisen in bringing it within the corresponding clause, 7 Geo. 3. c. 50. s. 3. because it appeared that the letter had not been destroyed, but was found in the prisoner's custody. (z)

Sloper's case. Secreting a letter with intent to embezzle the postage.

III. The embezzling or purloining of printed proceedings in parliament, newspapers, &c. by persons employed in the post-office, is made a misdemeanor by the statute 5 Geo. 4. c. 20. s. 10. which after reciting that serious loss, inconvenience, and injury may be sustained by the wilful embezzling or purloining of printed votes or proceedings in parliament, and printed newspapers sent by the post within the United Kingdom of Great Britain and Ireland, enacts "that if any deputy, clerk, agent, letter-carrier, let-

Embezzling votes, &c. in parliament or newspapers, &c. by persons in the post-office made a misdemeanor punishable by fine and imprisonment.

(y) Sloper's case, *cor.* Blackstone, J., O. B. 1772. 2 East. P. C. c. 16. s. 23. p. 583. 1 Leach 81. in which last authority it is said that the prisoner remained in Newgate till July 1777; and that in the following

Session, Sept. 1777, there was no account of him.

(z) 2 East. P. C. c. 16. s. 23. p. 583: and see Howatt's case, *post*, 238, 239.

"ter-sorter, post-boy, or rider, or any other officer or person
 "whatsoever employed or hereafter to be employed in receiving,
 "stamping, sorting, charging, conveying, or delivering letters or
 "packets, or in any other business relating to the post-office in
 "the said United Kingdom, shall wilfully purloin, embezzle, se-
 "crete, or destroy, or shall wilfully permit or suffer any other
 "person or persons to purloin, embezzle, secrete, or destroy, any
 "printed votes or proceedings in parliament, or printed news-
 "papers, or any other printed paper whatsoever, sent, or to be
 "sent by the post without covers, or in covers open at the sides,
 "each and every such person or persons so offending shall be
 "deemed and taken to be guilty of a misdemeanor, and be punished
 "by fine and imprisonment, and such offences shall and may be
 "enquired of, tried and determined, either in the county where
 "the offence shall be committed, or where the party shall or may
 "be apprehended."

Of the stealing
 of letters by
 persons not
 employed in
 the post-office,
 7 Geo. 3. c.
 50. s. 2.

Persons rob-
 bing any mail
 of any letters,
 &c. or stealing
 out of any
 mail, bag,
 post-office,
 &c. any let-
 ters, &c. are
 to be deemed
 guilty of fel-
 ony without
 clergy.

IV. The stealing letters, sent by the post, or from any post-office, &c. though by persons not employed in the post-office, was made a capital offence, by 7 Geo. 3. c. 50. s. 2. and is now liable to capital punishment by the 52 Geo. 3. c. 143. s. 3.

The 7 Geo. 3. c. 50. s. 2. enacts, "that if any person or persons
 "whatsoever shall rob any mail or mails in which letters are sent
 "or conveyed by the post, of any letter or letters, packet or
 "packets, bag or mail of letters; or shall steal and take from or
 "out of any such mail or mails, or from or out of any bag or
 "bags of letters, sent or conveyed by the post, or from or out of
 "any post-office, or house or place for the receipt or delivery of
 "letters or packets sent or to be sent by the post, any letter or
 "letters, packet or packets; although such robbery, stealing or
 "taking, shall not appear, or be proved to be a taking from the
 "person, or upon the king's highway, or to be a robbery com-
 "mitted in any dwelling-house, or any coach-house, stable, barn,
 "or any outhouse belonging to a dwelling-house; and although it
 "should not appear that any person or persons were put in fear
 "by such robbery, stealing or taking; yet, such offender or of-
 "fenders, being thereof convicted as aforesaid, shall, nevertheless,
 "respectively be deemed guilty of felony; and shall suffer death
 "as a felon, without benefit of clergy."

42 Geo. 3. c.
 81. s. 3. As
 to the place of
 trial for the
 foregoing of-
 fences.

With respect to the trial of the offences mentioned in the fore-
 going clause, the statute 42 Geo. 3. c. 81. s. 3. enacts, that if
 committed in England, they may be tried either in the county
 where the offence is committed, or wherein the offender is appre-
 hended; and if committed in Scotland, they may be tried either in
 the justiciary court of Edinburgh, or in the court of the circuit
 within which the offence is committed, or the offender appre-
 hended. (z)

(z) Before this statute it was decided
 that an indictment for robbing a mail
 bag of letters must be laid in the
 county where the letters were actually
 taken, in order to bring the case
 within the statute 7 Geo. 3. c. 50. s.
 2.; and that it could not be laid in

the county where the prisoner was
 only in possession of them; the jury
 having found that the letters were
 taken from the bag in some other
 county, through which the mail had
 passed. *Thomas's case*, O. B. 1794.
 2 Leach 634. 2 East. P. C. c. 16. s.

The first section of the statute 52 Geo. 3. c. 143. enacts, as we have seen, that where any act, committed after the passing of that statute, in breach of, or in resistance to, any part of the revenue laws of Great Britain, would, by the laws then in force, subject the offender to suffer death, without benefit of clergy; such act, so committed, shall be felony within clergy, unless the same be also declared to be felony without benefit of clergy by that statute. (a)

The third section of the 52 Geo. 3. c. 143. then enacts, "that if any person shall steal and take from any carriage, or from the possession of any person employed to convey letters sent by the post of Great Britain, or from or out of any post-office or house or place for the receipt or delivery of letters or packets, or bags or mails of letters, sent or to be sent by such post, any letter or packet or bag or mail of letters sent or to be sent by such post, or shall steal and take any letter or packet out of any such bag or mail, every person so offending, and being thereof convicted, shall be adjudged guilty of felony, and shall suffer death as a felon, without benefit of clergy; and such offences shall and may be enquired of, tried and determined either in the county where the offence shall be committed, or where the party shall or may be apprehended."

In a case upon the statute 7 Geo. 3. c. 50. s. 2. it appeared that the prisoner, intending to steal the mail bags, went one night, about the usual time, to the post-office at High Wycombe; and, pretending to be the mail guard, obtained, from the person who was there, the bags of letters, which were let down to him from out of the window of the post-office by a string, from whence he took them, and immediately made off. Upon these facts the prisoner was convicted on a count in the indictment for stealing the letters out of the post-office; and the case being submitted to the consideration of the twelve Judges, they were all of opinion that the conviction was right; and that the artifice of the prisoner, in obtaining the delivery of the letters, in the bag, out of the house, was the same as if he had actually taken them out himself. (b) In this case the property did not pass; as the post-master had no property in the mail bags to part with. (c)

It was supposed to have been decided that the second section of the statute, 7 Geo. 3. c. 50. does not extend to servants of the post-office. (d) But the report of such decision has been mentioned as

52 Geo. 3. c. 143. Clergy extended, unless otherwise provided by this act.

52 Geo. 3. c. 143. s. 3. Persons stealing from any carriage, post-office, &c. any letter, &c. made guilty of felony without clergy; and may be tried in the county where the offence is committed, or where the party is apprehended.

Pearce's case. The prisoner obtained the mail bags fraudulently by the delivery of a person in the post-office to him, while on the outside; and it was holden to be a stealing out of the post-office.

39. p. 605. It was argued in this case that there was a new taking and offence in the county where the prisoner had possession of the letters: but upon this it is observed that the statute 7 Geo. 3. c. 50. s. 2. did not make the stealing of letters generally a capital offence, but the stealing them from the places particularly specified; which is a definite act, local in its nature, and cannot be extended, by construction, to a new taking in every county into which the thing stolen is conveyed, as in the case of

simple larceny. 2 East. P. C. c. 16. s. 39. p. 606.

(a) See this section more at large, *ante*, 228.

(b) Pearce's case, Hil. T. 1793. 2 East. P. C. c. 16. s. 39. p. 603.

(c) This was noticed as differing the case from that of Atkinson, 2 East. P. C. c. 16. s. 104. p. 673. *Ante*, 117.

(d) Rex v. Pooley, Russ. & Ry. 31. 2 Leach 904. 1 East. P. C. *Addenda*, xvii. 3 Bos. & Pul. 315. Skutt's case, O. B. July Sess. 1774, as

incorrect. And it is clear that a person may be indicted and convicted under the third section of the 52 Geo. 3. c. 143. for stealing a letter, though such person has an employment in the post-office, especially if such letter did not come to him in the course of his employment. The prisoner was employed by the post-office to deliver letters, and not to sort them; but he did sort them, when regularly he ought not to have done so, and, whilst sorting, stole a letter. The indictment charged him as a sorter with secreting, and as a common person (under s. 3. of the 52 Geo. 3.) with stealing: but as it appeared that he ought not to have been allowed to sort, he was acquitted of secreting, and it was then urged that he could not be convicted under the third section, because he was a person employed in the post-office, and the case of *Rex v. Pooley* was cited. A case being reserved, the Judges stated that the report of *Rex v. Pooley* was as to the point in question mistaken; that *Rex v. Simpson, cor. Lord Ellenborough, Thomson, B., and Lawrence, J., O. B. 1810*, was in point the other way; that a man who stole was not less a person stealing because he had some employment in the office; and that upon a contrary construction if a person in the office stole, but not in the course of his employment, he would be unpunishable. (e)

Howatt's case. Holden that a letter-carrier taking letters out of the office, intending to deliver them to the owners, but to embezzle the postage, is not indictable under the second section of the statute 7 Geo. 3. c. 50.

Previously to the last case it had been holden that a letter-carrier taking letters out of the post-office, intending to deliver them to the owners, but to *embezzle the postage*, is not indictable for stealing such letters, under the second section of the 7 Geo. 3. c. 50. In this case it appeared that the prisoner was a letter-carrier at the post-office, at Manchester; that he contrived to obtain possession of the letters in question before they were counted out, and delivered to him, by any of the clerks, in the usual way; and that he was detected with them in his pocket, in the letter-carrier's room, which was near to the clerk's office. But it appeared from circumstances, and the jury so found, when they convicted him of the offence of stealing the letters "that he intended to have delivered the letters, and only to have embezzled the postage." Upon the case being afterwards submitted to the consideration of the twelve Judges, two of them, at first, suggested that as the act of the prisoner deprived the crown of its lien, though there were no intention to defraud the true owner, it was as much larceny as stealing from a pawn-broker; and that the clause in question was positive, without adverting to the view with which the act was done. On the other hand it was observed that the two first clauses of the statute, (f) respected the safe carriage of letters, and seemed to be confined, as appeared further by the preamble, to a taking to the prejudice of the owner: and that the third clause (g) was for the protection of the revenue; which went to

stated in *Pooley's case*, 2 Leach 904. A different objection is mentioned as the ground of the acquittal in *Skutt's case* in another report of it (1 Leach 106. 2 East. P. C. c. 16. s. 22. p. 582.) namely, that the letters contained *money*, and not any security relating to the payment of money

mentioned in the statute.

(e) *Rex v. Brown*, East. T. 1817. MS. Bayley, J., and Russ. & Ry. 32. note (a).

(f) S. 1. *ante*, 229. S. 2. *ante*, 236.

(g) S. 3. *ante*, 235.

shew that the legislature did not mean to protect the revenue by the antecedent clauses. And it was also observed that if the letters had been so taken by those to whom they were directed, it would not have been within the clause under consideration: though, if it were a question of larceny at common law, it would be equally larceny in the owner. And this being an indictment on the statute, and not for taking the goods of such an one, as charged in an indictment for stealing the goods of a bailee, all the Judges ultimately agreed that the conviction was wrong, on the finding of the jury, which negatived a stealing within the act. (h)

In a case upon the statute 7 Geo. 3. c. 50. s. 2. where it appeared that the check or draft which the prisoner had taken out of the letter was drawn on unstamped paper, it was objected on behalf of the prisoner, that it could not be received in evidence, even as a medium to shew that he had stolen the letter; but the court overruled the objection, being of opinion that the draft, though unstamped, might be received in evidence for collateral purposes, though not for the purpose of recovering the money contained in it. And they relied upon the cases in which it had been decided that such an instrument might be given in evidence on an indictment for forging it, or in an action to recover the penalty. (i)

A draft or check on *unstamped paper*, may be received in evidence, for collateral purposes,—as to prove the stealing, &c.

V. The statute 42 Geo. 3. c. 81. relates to the secreting, or refusing to deliver up any mail, bag of letters, letters, or packets, which shall have been found, or picked up, or shall have been left at any house by mistake or accident.

Of secreting, &c. letters, or bags, or mails of letters, which shall have been found, or picked up, or left at any house by mistake, or accident.

The fourth section of this statute recites that it frequently happened that bags, or mails of letters, sent by the post, having been stolen, or accidentally lost, and afterwards found, or picked up, were wilfully detained by the persons finding the same, in expectation of gain or reward; and then enacts, “that if any person or persons “shall wilfully secrete, keep, or detain, or, being required to deliver “up by any deputy, clerk, agent, letter-carrier, post-boy, rider, “driver, or guard of any mail-coach, or any other officer or person “whatsoever employed or to be employed in any business relating “to the post-office, shall refuse or wilfully neglect to deliver up any “mail or bag of letters, sent or conveyed, or made up in order to “be sent or conveyed by the post, or any letter or letters, packet or “packets, sent or conveyed by the post, or put for that purpose “into any post-office, or house or place for the receipt or delivery “of letters or packets sent or to be sent by the post, and which “letter or letters, packet or packets, bag or mail of letters, shall “have been found or picked up by the same or any other person or “persons, or shall by or through accident or mistake have been left “with or at the house of the same or any other person or persons, “each and every person or persons so offending shall be deemed

(h) Howatt's case, *Lancaster Sum. Ass.* 1795. and *Mich. T.* 1795. 2 *East. P. C. c.* 16. s. 39. p. 604. But see *ante*, 234, *et sequ.* as to the statutable provisions against destroying letters or embezzling the postage by persons employed in the post-office.

(i) Pooley's (second) case, *O. B.* 1801. 2 *Leach* 909, *S. C.* 1 *East. P. C. Addenda*, xvii., and 3 *Bos. & Pul.* 315. And see Morton's case, and Reculist's case, *post.* Chap. on *Forgery*.

“and taken to be guilty of a misdemeanor, to be punished by fine
“and imprisonment.”

48 Geo. 3. c.
116. as to let-
ters conveyed
between the
United King-
dom and Ma-
deira, and
other territo-
ries of Por-
tugal.

In concluding this Chapter, the statute 48 Geo. 3. c. 116. may be briefly noticed, which enacts, that, after the establishment of the packet-boats therein mentioned, all the clauses, &c., and all other matters and things contained in any act or acts of parliament relating to the post-office shall extend to letters and packets to be conveyed between the United Kingdom and the island of Madeira, and other territories and possessions of the crown of Portugal mentioned in the statute.

CHAPTER THE TWENTY-SECOND.

OF LARCENY AND EMBEZZLEMENT OF NAVAL AND MILITARY STORES.

A LATE statute 4 Geo. 4. c. 53¹ enacts, "That every person who shall be lawfully convicted of stealing or embezzling his majesty's ammunition, sails, cordage, or naval or military stores, or of procuring, counselling, aiding or abetting any such offender shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned only, or to be imprisoned and kept to hard labour in the common gaol or house of correction for any term not exceeding seven years."

4 Geo. 4. c. 53. Persons stealing or embezzling ammunition or other naval or military stores, may be transported for life, or sentenced to a less punishment at discretion.

Some provisions respecting the embezzlement of naval stores, when under the value of twenty shillings, are made by the 1 Geo. 1. stat. 2. c. 25. The third section enacts, "That the principal officers and commissioners of the navy therein mentioned, or any of them, may enquire and by warrant under hand and seal empower any person to search for stores and ammunition pertaining to the navy, which may have been privately embezzled or filched away, in like manner as justices of peace may do in case of felony, and may punish the offender by fine, imprisonment, or either of them, (the fine not exceeding twenty shillings, and the imprisonment not exceeding one week) (a) the value of the goods so embezzled or filched away, not exceeding the sum of twenty shillings, and may cause the goods to be brought in again; and, if the offence be of such a nature as requires a higher and severer punishment, may commit the offender to gaol or to the custody of their messenger till he enters into recognizance, with surety, according to the nature of the offence, to appear and answer in the court of exchequer or other court where his majesty shall question him for the same, within one year following, on process being duly served upon him for that purpose."

1 Geo. 1. st. 2. c. 25. Summary proceedings in respect of the embezzlement of naval stores under the value of twenty shillings.

The fourth section of this statute recites, "that divers ill-disposed persons upon pretence of carrying his majesty's naval goods, provisions, victuals, stores and ammunition, from his majesty's yards, wharfs, storehouses or other places, to his majesty's ship or ships, or to such ship or ships as are employed in

S. 4 recites the necessity of justice being more speedily done in many cases

(a) See s. 1.

of embezzlements of naval stores.

The treasurer, commissioners, &c. of the navy, when the goods embezzled are under the value of 20s. may convict the offenders in a summary way, and impose fines, &c.

"his majesty's service, or such persons as are employed to re-
 "carry or remove from the said ship or ships such naval stores,
 "goods, provisions, victuals, stores, and ammunition, to such, his
 "majesty's yards, wharfs, storehouses or other places, do fre-
 "quently imbezil, take and carry them away, where they cannot
 "be found, and remove themselves to places unknown, before they
 "can be apprehended or convicted by due process of law, by rea-
 "son that those witnesses that should prove the said facts are
 "bound forth to sea, or otherwise employed elsewhere, and it is
 "found necessary that justice be more speedily done in such
 "cases than by ordinary course of law it can be:" and then it
 "enacts, "that the treasurer, comptroller, surveyor, clerk of the
 "acts, and commissioners of the navy for the time being, or any
 "one or more of them, where the goods so imbezilled, taken or
 "carried away, shall be under the value of twenty shillings, shall
 "have full power and authority, upon the oath of one or more
 "witnesses (which they or any of them have hereby power to ad-
 "minister) or confession of such party so offending, as aforesaid,
 "or other legal proof thereof, to convict the party or parties so
 "offending, by writing under his or any of their hands and seals,
 "and to impose such fine or fines upon all and every such person
 "or persons so offending and convicted, as aforesaid, as to the
 "said treasurer, comptroller, surveyor, clerk of the acts, and the
 "commissioners of the navy, for the time being, or any one or
 "more of them, shall in his or their discretion seem meet; the
 "said fine or fines not exceeding double the value of the naval
 "goods, provisions, victuals, stores, or ammunition so imbezilled
 "or carried away; which fine or fines shall be levied by distress
 "and sale of the goods of such offender, by virtue of the warrant
 "of such officer or officers who shall so convict the said offender,
 "directed in manner aforesaid, to the person or persons aforesaid,
 "returning the overplus, if any be, to the owner of such goods;
 "or in case no sufficient distress can be found as aforesaid, the
 "party or parties so offending shall, by virtue of the warrant of
 "such officer before whom such person or persons shall be con-
 "victed, be imprisoned in the next gaol for any space of time not
 "exceeding three months without bail or mainprize."

9 Geo. 3. c. 30.
 s. 5. As to the
 apprehension
 of persons
 stealing or
 embezzling
 naval stores.

The statute 9 Geo. 3. c. 30, s. 5. relates to the apprehension of persons stealing or embezzling naval stores. It enacts "that for
 "the more speedy and effectual bringing to justice persons guilty
 "of stealing or embezzling his majesty's naval stores, the trea-
 "surer, comptroller, surveyor, clerk of the acts, or any commis-
 "sioners of the navy for the time being, may, from time to time
 "in all places whatsoever, exercise the office of a justice of the
 "peace to all intents and purposes, in causing any person who
 "shall be charged with stealing or embezzling of any naval stores,
 "the property of his majesty, to be apprehended, committed, and
 "prosecuted for the same; and it requires all constables and
 "other officers to execute and obey all warrants of such persons,
 "touching any of the matters and things thereinbefore con-
 "tained."

55 Geo. 3. c.
 103. s. 127.

Provision is made for the punishment of persons embezzling military stores, by the proceedings of a court-martial. The sta-

tute 55 Geo. 3. c. 108. s. 127. (b) enacts, " that every paymaster
 " or other commissioned officer of his majesty's forces, or any
 " storekeeper, or commissary, or deputy or assistant commissary,
 " or other person employed in the commissariat department, or in
 " any manner in the care or distribution of any money, provisions,
 " forage or stores belonging to his majesty's forces, or for their
 " use, who shall embezzle or fraudulently misapply, or cause to be
 " embezzled or fraudulently misapplied, or shall knowingly or
 " wilfully permit or suffer any money, provisions, forage, arms,
 " clothing, ammunition or other military stores, to be embezzled
 " or fraudulently misapplied, or to be spoiled or damaged; and it
 " shall be lawful for such court-martial to adjudge any such pay-
 " master or other commissioned officer, storekeeper or commis-
 " sary, or deputy or assistant commissary, or other person, to be
 " transported as a felon for life, or for any certain term of years,
 " or to suffer such punishment of pillory, fine, imprisonment, dis-
 " missal from his majesty's service, and incapacity of serving his
 " majesty in any office civil or military, as any such court shall
 " think fit, according to the nature and degree of the offence, and
 " every such officer or person shall, in addition to any other pu-
 " nishment, make good, at his own expense, the loss and damage
 " sustained which shall have been ascertained by such court-mar-
 " tial; and the loss and damage so ascertained as aforesaid may
 " be recovered in any of his majesty's courts of record at West-
 " minster or in any other courts of law having jurisdiction, where
 " any person adjudged by a court-martial to have incurred any
 " such penalties, or to make good any such losses or damages
 " shall be resident after the said judgment shall be confirmed and
 " made known; and after the said sum shall be recovered and
 " levied, the same shall be applied and disposed of as his majesty
 " shall direct and appoint."

Persons em-
 ployed in the
 care of mili-
 tary stores,
 embezzling,
 &c. may be
 tried by a
 court-martial
 and be trans-
 ported, &c.

The offences of knowingly receiving, or concealing naval or military stores which have been stolen, or of unlawfully having possession of naval or military stores, will be mentioned in a subsequent chapter.

(b) The mutiny act of 1815. A similar enactment is contained in the subsequent mutiny acts.

CHAPTER THE TWENTY-THIRD.

OF LARCENY OF CLOTH AND OTHER ARTICLES IN A PROCESS OF MANUFACTURE.

PARTICULAR provisions have been enacted by several statutes for punishing the embezzlement of articles in a course of manufacture, which as they relate to petty offenders, (principally workmen employed in particular manufactories) and subject them to the summary jurisdiction of justices of the peace, do not come within the scope of this treatise. (a)

7 & 8 Geo. 4. c. 29.
Stealing certain goods in process of manufacture, punishable by transportation for life, or lesser punishment, at the discretion of the court.

The statute 7 & 8 Geo. 4. c. 29. s. 16. enacts "that if any person shall steal to the value of ten shillings any goods or article of silk, woollen, linen or cotton, or of any one or more of these materials mixed with each other, or mixed with any other material, whilst laid, placed, or exposed during any stage, process, or progress of manufacture, in any building, field, or other place, every such offender being convicted thereof shall be liable to any of the punishments which the court may award as hereinbefore last mentioned." The reference is to s. 14. by which the offender is liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, and, if a male, to be once, twice, or thrice publicly or privately whipped, (if the court shall so think fit) in addition to such imprisonment.

Principals in the second degree, and accessories.

By s. 61. principals in the second degree and accessories before the fact are punishable in the same manner as principals in the first degree; and accessories after the fact, (except receivers of stolen property) are liable to be imprisoned for any term not exceeding two years.

Cases upon the repealed act 18Geo. 2. c. 27.

Some questions may possibly arise upon the words "laid, placed, or exposed during any stage, process or progress of manufacture in any building, field, or other place." In a case in which the prisoner was indicted upon a statute 18Geo. 2. c. 27. now repealed, for stealing yarn out of a bleaching ground, the evidence was that the yarn had been spread upon the ground, but was afterwards taken up and thrown into heaps in order to be carried into the house, in which state some of it was stolen by the

(a) The greater part of them will be found collected and well arranged in 5 Burn. Just. tit. *Servants*.

prisoner; Thomson, B., held that the case did not come within the statute, as there was no occasion to leave the yarn upon the ground in the state in which it was taken by the prisoner. (b) So in another case upon that statute where the indictment was for stealing calico placed to be printed and dried in a certain building, it was held, that in order to support the capital charge, it was necessary to prove that the building from which the calico was stolen was made use of either for drying or printing calico. (c) But it should be observed, that this repealed statute mentioned particularly a building, &c. made use of by any calico printer, &c. for printing, whitening, bowking, bleaching, or drying.

(b) *Hugill's case*, *cor.* Thomson, B., at *York*, 4 Black. Com. 240. note (8) ed. 1800. (c) *Rex v. Dixon and others*, Russ. & Ry. 53.

CHAPTER THE TWENTY-FOURTH.

OF LARCENY BY TENANTS AND LODGERS.

Qn. offence at common law.

It was long doubted whether, as a lodger had a special property in the goods which were let with his lodgings, the stealing of them was felony: (a) and it was at length decided by a majority of the Judges that it was not. (b) In consequence of this decision, the 3 W. & M. c. 9. s. 5. was passed, which, after reciting that it was a frequent practice for idle and disorderly persons to hire lodgings with an intent to have an opportunity to take away, imbezel, or purloin the goods and furniture being in such lodgings, enacted and declared that if any person or persons should take away, with an intent to steal, imbezel, or purloin, any chattel, bedding, or furniture, which by contract or agreement he or they were to use, or should be let to him or them to use, in or with such lodging, such taking, imbezzilling, or purloining, should be to all intents and purposes taken, reputed, and adjudged to be larceny and felony, and the offender should suffer as in case of felony.

Several points of nicety and difficulty arose upon the construction of this statute, and upon the statement of the contract in the indictment, (c) but it was repealed by the 7 & 8 Geo. 4. c. 27.,

(a) Raven's alias Aston's case, Kcl. 24, 81, 82. 1 Hawk. P. C. c. 43. s. 2. And see as to a special property or bare use, &c. *ante*, 106, 107.

(b) Meeres's case, Show. 50. One of the Judges thought it was felony, and that a lodger had a bare use of the goods, like a guest. And two of the Judges only thought it no felony, because no intent was found to steal, either in the taking the lodgings, or carrying away the goods. And all the Judges thought it a point deserving very good consideration. Show. 55. Mr. East remarks upon the point, that if it clearly appear that a lodger took the lodgings with intent to gain a better opportunity of rifling them, and to elude the law, there seems no reason why it should not be felony at common law. 2 East. P. C. c. 16. s. 26. p. 585. And in 6 Ev. Col. Stat. Pt. V. Cl. VII. No. 17. p. 472. note

(13) a *Qn.* is made whether it would not now be holden that a lodger purloining furniture is guilty of larceny at common law, on the ground of the possession still continuing in the owner of the house. But it has lately been ruled that if a man hires a lodging with intent that a comrade of his may steal the furniture, the thief cannot be indicted at common law as for stealing the goods of the original owner, *Rex v. Belstead*, East. T. 1820, MS. Bayley, J., and Russ. & Ry. 411.

(c) 2 East. P. C. 586. 6 Ev. Col. Stat. Pt. V. Cl. VII. No. 17. p. 472. note (14). Brown's case, 1 Hawk. P. C. c. 43. s. 3. Palmer's case, 2 Leach 680. 2 East. P. C. 586. Pope's case, 1 Leach 386. 2 East. 587. Bill's case, 1 Hawk. P. C. c. 43. s. 7. *Rex v. Goddard and Fraser*, 2 Leach 545. Pike's case, 1 Hawk. P. C. c.

and the statute passed for consolidating and amending the laws relative to larceny has substituted a more simple enactment, and provided that the indictment shall be in the common form as for larceny.

The 7 & 8 Geo. 4. c. 29. s. 45. for the punishment of depredations committed by tenants and lodgers enacts, "that if any person shall steal any chattel or fixture let to be used by him or her in or with any house or lodging, whether the contract shall have been entered into by him or her, or by her husband, or by any person on behalf of him or her, or her husband, every such offender shall be guilty of felony, and being convicted thereof, shall be liable to be punished in the same manner as in the case of simple larceny; and in every such case of stealing any chattel, it shall be lawful to prefer an indictment in the common form as for larceny, and, in every such case of stealing any fixture, to prefer an indictment in the same form as if the offender were not a tenant or lodger, and in either case to lay the property in the owner or person letting to hire."

7 & 8 Geo. 4.
c. 29. s. 45.
Tenants and
lodgers steal-
ing any prop-
erty from
houses or
apartments
let to them.

43. s. 4. Mann's case, 1 Hawk. P. C. & Mood. Cr. Cas. 1. Rex v. Bew,
c. 43. s. 6. Butler's case, 1 Hawk. Russ. & Ry. 480.
P. C. c. 43. s. 8. Rex v. Healey, Ry.

CHAPTER THE TWENTY-FIFTH.

OF EMBEZZLEMENTS AND FRAUDS BY BANKRUPTS.

- 6 Geo. 4. c. 16. Bankrupt not surrendering and submitting to be examined ;
- or not making discovery of his estate and effects ;
- or not delivering up his goods, books, &c. ;
- or removing or embezzling to the value of 10*l*. felony.
- Punishment.
- Lord Chancellor may enlarge time for surrender.
- THE statute 6 Geo. 4. c. 16. s. 112. enacts, “ that if any person
 “ against whom any commission has been issued, or shall hereafter
 “ be issued, whereupon such person hath been or shall be declared
 “ bankrupt, shall not, before three of the clock, upon the forty-
 “ second day after notice thereof in writing, to be left at the usual
 “ place of abode of such person, or personal notice in case such
 “ person be then in prison, and notice given in the London
 “ Gazette of the issuing of the commission, and of the meetings
 “ of the commissioners, surrender himself to them, and sign or
 “ subscribe such surrender, and submit to be examined before
 “ them, from time to time, upon oath, or, being a Quaker, upon
 “ solemn affirmation ; or if any such bankrupt, upon such ex-
 “ amination, shall not discover all his real or personal estate, and
 “ how and to whom, upon what consideration, and when he dis-
 “ posed of, assigned or transferred any of such estate, and all
 “ books, papers and writings relating thereunto, (except such part
 “ as shall have been really and *bond fide* before sold or disposed
 “ in the way of his trade, or laid out in the ordinary expence of his
 “ family) ; or if any such bankrupt shall not, upon such exami-
 “ nation, deliver up to the commissioners all such part of such
 “ estate, and all books, papers and writings relating thereunto, as be
 “ in his possession, custody or power, (except the necessary
 “ wearing apparel of himself, his wife and children) ; or if any
 “ such bankrupt shall remove, conceal or embezzle any part of
 “ such estate, to the value of ten pounds or upwards, or any
 “ books of account, papers or writings relating thereto, with intent
 “ to defraud his creditors, every such bankrupt shall be deemed
 “ guilty of felony, and be liable to be transported for life, or for
 “ such term, not less than seven years, as the court before which
 “ he shall be convicted shall adjudge, or shall be liable to be im-
 “ prisoned only, or imprisoned and kept to hard labour in any
 “ common gaol, penitentiary-house or house of correction, for any
 “ term not exceeding seven years.”
- The 113th section enacts “ that the Lord Chancellor shall have
 “ power, as often as he shall think fit, from time to time to en-
 “ large the time for the bankrupt surrendering himself for such

"time as the Lord Chancellor shall think fit, so as every such order be made six days at least before the day on which such bankrupt was to surrender himself."

The 115th section enacts, "that if any bankrupt apprehended by any warrant of the commissioners shall, within the time hereby allowed for him to surrender, submit to be examined, and in all things conform, he shall have the same benefit as if he had voluntarily surrendered."

Proviso for
surrender
by bankrupt
apprehended.

Upon the repealed statute 5 Geo. 2. c. 30. which contained provisions of a similar nature, though (as to some of them) imperfectly framed, it was observed, that no instance ever occurred of a capital punishment, or (as was believed) of a capital conviction, for the mere omission to surrender. (a) And the learned Judges presiding in the Court of Chancery, in many instances, superseded commissions, in order to prevent a prosecution for not surrendering in time, where there did not appear to have been any intention in the bankrupt of defrauding his creditors by not appearing within the time appointed, and where his absence proceeded rather from an ignorance of the consequence, or accident. (b) Such an order did not, however, prevent a prosecution, but operated only as an intimation of the Chancellor's opinion that the bankrupt did not keep out of the way fraudulently, and that it was a case in which the Chancellor did not see reason to think that if prosecuted he would have been convicted; (c) and it appears clear that there must have been a wilful omission to surrender to constitute a felony. (d)

Repealed
statute, 5 Geo.
2. c. 30.

Very few points appear in the books upon the construction of this repealed statute, and some of them are inapplicable to the present law. (e)

Points upon
the repealed
statute.

In an early case, upon the repealed statute, an objection was taken to an indictment that there ought to have been an averment in the indictment, that the commissioners did sit, and that those commissioners should have been named; whereas they were not named in the notice, which only set forth that he was required to surrender to *the commissioners at Guildhall*; and it might as well be understood of the commissioners of sewers, or of the lieutenantancy, as of the commissioners of bankrupts, for they all sit at the same *Guildhall*. The court were of opinion that this, together with other objections, was good. (f)

(a) 4 Ev. Col. Stat. *Bankrupts*, p. 88.

(b) Ex parte Wood, 1 Atk. 222.
Ex parte Shiles, 1 Madd. 249.

(c) By the Vice-Chancellor in Ex parte Shiles, 1 Madd. 249.

(d) *Id. Ibid.*

(e) The 1 Geo. 4. c. 115. s. 1. after reciting so much of the 5 Geo. 2. c. 30. as made it a capital felony for a bankrupt to conceal, embezzle, &c. to the value of 20l. or any books of account, &c. with an intent to defraud his creditors, enacted, that so much of the said act as inflicted capital punishment of death on the offence thereinbefore recited should be repealed, and

that any person duly convicted of the offence thereinbefore recited, which was punishable with death, under the recited act, should be liable to be transported beyond the seas for life, or for such term not less than seven years, as the court should adjudge, or should be liable to imprisonment, or imprisonment and hard labour, for any term not exceeding seven years. Then succeeded the present statute 6 Geo. 4. c. 16.

(f) Rex v. Frith, O. B. 1738. 1 Leach 10. Upon this opinion of the Court being pronounced, the prosecutor moved that the indictment might

Nicety in framing indictments on that statute.

It was observed that the principal nicety in framing an indictment on that statute consisted in the recital of the proceedings before and under the commission. (g)

And the necessary evidence required attention; as it was necessary to prove regularly the trading, the petitioning creditor's debt, the act of bankruptcy, the issuing the commission, and the subsequent proceedings. "While the commission subsists, its validity may be assumed for certain civil purposes; but when a criminal case occurs, unless the party was a bankrupt, all falls to the ground." (h) In a case where a defendant was indicted for refusing to give the commissioners an account of his effects, he was acquitted on the ground that he was an infant at the time the debts were contracted, and could not, therefore, be a bankrupt for debts which he was not obliged to pay. (i) And the Court of Chancery refused to lend its aid to a prosecution on that statute by ordering the clerk under the commission to attend the trial, and produce the proceedings. (k)

The following points were understood to have been decided in a case upon the repealed statute in which the defendant was charged by the indictment with concealing his effects to the amount of 20*l.* with intent to defraud his creditors: First, that an averment in an indictment for felony, that a commission issued under the great seal of *Great Britain*, was sufficiently proved by evidence that it issued under the great seal of Great Britain and Ireland; secondly, that a bankrupt could not set up a prior secret act of bankruptcy to invalidate his commission; thirdly, that a creditor might prove the act of bankruptcy before the commissioners; and, fourthly, that a commission of bankruptcy was not liable to any of the stamp duties imposed by the 44 Geo. 3. c. 98. (l)

It was also ruled that in an indictment against a bankrupt where the petitioning creditors' debt was alleged to be due to A., B., and C., surviving executors of the last will and testament of D., after proof that A., B., and C., were the executors, and were directed by the will to carry on the business, it was necessary to prove that they all assented to act in discharge of the

be quashed. But the Court said it was by no means proper to encourage the quashing of indictments after prisoners have pleaded. The motion was accordingly refused; and the prisoner being put upon his defence, an acquittal was entered, 1 Leach. 11. But the Court may, in its discretion, quash an indictment at any time before the jury are charged with the trial of the prisoner.

(g) 2 Chit. Crim. L. 511. notes.

(h) By Lord Ellenborough, C. J., in *Rex v. Punshon*, 3 Campb. 97.

(i) *Rex v. Cole*, 1 Ld. Raym. 448.

(k) 1 Hawk. P. C. c. 49. *Fraudulent Bankruptcy*, s. 7.

(l) *Rex v. Bullock*, 2 Leach 996. 1 Taunt. 71. But upon the third point, viz. the proof of the act of bankruptcy by a creditor, a Qu. is

made by the reporter in 2 Leach 996; and in 1 Taunt. 71. the marginal note upon this point is, "*Semble*, that commissioners of bankrupt may receive evidence of the act of bankruptcy from a creditor, who seeks to prove under the commission; or at least if they do, after evidence *aliunde* of the act of bankruptcy, proof that the commissioners declared the bankrupt to be such on the creditors' evidence will not disprove the allegation that he was duly declared a bankrupt." But it has been ruled in a late case that upon an issue to try whether an act of bankruptcy has been committed a creditor is an incompetent witness, though he has not proved under the commission, *Crooke v. Edwards*, 1 Stark. R. 302. And see *Adams v. Malkin*, 3 Campb. 543.

trust: and that a general admission by the prisoner of a debt, due to the executors of D., would not supply the defect. (m)

It appears to have been holden, that where an indictment against a bankrupt for concealing property did not, in stating the property, sufficiently specify particular parts of it, though it might have sufficiently specified others, and those specified might have been of the necessary value, such indictment was bad, on the ground that the statement as to the parts not specified tended to embarrass the prisoner. And the decision appears to have proceeded upon the principle that where value is essential to constitute an offence, and the value is ascribed to many articles collectively, the offence must be made out as to every one of those articles; the grand jury having only ascribed that value to all those articles collectively. (n)

Indictment bad for not specifying sufficiently, particular parts of the property.

Upon an indictment on the same repealed statute of 5 Geo. 2. charging the bankrupt with not submitting to be examined, it was decided, that if a bankrupt surrendered to his commission, and at the time of such surrender refused to answer particular questions concerning his property, but took the oath, and assigned, as his reason for not answering, that he intended to dispute the commission, the refusal to answer such question was not a capital offence within the statute. (o)

Refusal to submit to examination.

Upon an indictment on the same statute, qualified by 1 Geo. 4. c. 115. s. 1., against a bankrupt for concealing his effects, where the evidence was that the prisoner, on his last examination, stated that a book given in by him contained an account of all his effects, it was holden to be incumbent on the prosecutor to produce the book, or to account for its non-production. The book was a necessary part of the prosecutor's case, in order that it might have been seen whether that book mentioned the property. (p)

Evidence.

It was agreed that a bankrupt's wife could not be examined on the part of the prosecution, on an indictment against the bankrupt for offences against that statute. (q)

It seems that the production of the *Gazette* will be sufficient without proof of its being bought of the *Gazette* printer, or where it comes from: and possibly, where the prisoner has appeared to his commission, and been examined, averment of notice in the *Gazette* may not be necessary. (r)

(m) *Rex v. Barnes*, 1 Stark. R. 243. In this case it was also ruled that, although the probate of a will had been produced, the will itself could not be read in evidence upon the mere production of it by the officer of the ecclesiastical court, without some indorsement upon it for the purpose of authentication.

(n) *Rex v. Forsyth*, Russ. & Ry. 274.

(o) *Rex v. Page*, Russ. & Ry. 392.

(p) *Rex v. Evani*, (1825,) Ry. & Mood. Cr. Cas. 70.

(q) 1 Hawk. P. C. c. 49. of *Fraudulent Bankruptcy*, s. 4. *Ex parte James*,

1 P. Wms. 610., where the Lord Chancellor said, that a wife could not by the common law be a witness for or against her husband; and that though a former statute 21 Jac. 1. authorized the commissioners to examine the wife touching any concealments of the goods, effects, or estate of the bankrupt, yet it did not extend to examining the bankrupt's wife touching his bankruptcy, or whether he had committed any act of bankruptcy, and how or when he became a bankrupt.

(r) *Forsyth's case*, Russ. & Ry. 277. But it will be more prudent to be provided with the full proof.

CHAPTER THE TWENTY-SIXTH.

OF EMBEZZLEMENTS AND FRAUDS BY INSOLVENT DEBTORS.

Wilfully omit- THE statute 7 Geo. 4. c. 57. s. 70. enacts "that in case any pri-
 ting any thing "soner shall, with intent to defraud his or her creditors or cre-
 in schedule,) "ditor, wilfully and fraudulently omit in his or her schedule, so
 "sworn to as aforesaid, any effects or property whatsoever, or re-
 "tain or except out of such schedule, as wearing apparel, bedding,
 "working tools and implements, or other necessaries, property of
 "greater value than twenty pounds, every such person so offend-
 "ing, and any person aiding and assisting him to do the same,
 "shall, upon being thereof convicted by due course of law, be
 misdemeanor, "adjudged guilty of a misdemeanor, and thereupon it shall and
 "may be lawful for the court before whom such offender shall
 "have been so tried and convicted, to sentence such offender to
 "be imprisoned, and kept to hard labour for any period of time
 "not exceeding three years; and that in every indictment or in-
 what matters "formation against any person for such offence, it shall be suf-
 only indict- "ficient to set forth the substance of the offence charged on the
 ment need set "defendant, without setting forth the petition, or conveyance, or
 out. "assignment to the provisional assignee, appointment of assignee
 "or assignees, or any conveyance or assignment whatever, or
 "balance sheet, order for hearing, adjudication, order of discharge
 "or remand, or any warrant, rule, order or proceeding of or in
 "the said court, except so much of the schedule of such prisoner
 "as may be necessary for the purpose."

CHAPTER THE TWENTY-SEVENTH.

OF RECEIVING STOLEN GOODS.

RECEIVERS of stolen goods were at common law punishable only as for a misdemeanor, even after the thief had been convicted of felony in stealing them; (a) but by the provisions of several statutes, now repealed, such receivers were made accessories after the fact to the felony of the thief, in cases where the thief had been convicted, or was amenable to justice; and were made liable to be prosecuted for a misdemeanor in cases where the thief had not been convicted, and whether he was amenable to justice or not. And the late statute 7 & 8 Geo. 4. c. 29., passed for consolidating and amending the laws relative to larceny, contains several enactments upon the subject of receiving stolen goods.

The offence at common law was only misdemeanor.

Section 54 of that statute enacts, “that if any person shall receive any chattel, money, valuable security, or other property whatsoever, the stealing or taking whereof shall amount to a felony, either at common law, or by virtue of this act, such person knowing the same to have been feloniously stolen or taken, every such receiver shall be guilty of felony, and may be indicted and convicted either as an accessory after the fact, or for a substantive felony; and in the latter case, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice; and every such receiver, howsoever convicted, shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fourteen years, nor less than seven years, or to be imprisoned for any term not exceeding three years, and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit) in addition to such imprisonment: provided always, that no person howsoever tried for receiving as aforesaid, shall be liable to be prosecuted a second time for the same offence.”

7 & 8 Geo. 4. c. 29. s. 54. Receivers of stolen property: where the original offence is felony, the receivers may be tried either as accessories after the fact, or for a substantive felony.

The 55th section enacts, “that if any person shall receive any chattel, money, valuable security, or other property whatsoever, the stealing, taking, obtaining, or converting whereof is made an indictable misdemeanor by this act, such person knowing the same to have been unlawfully stolen, taken, obtained, or con-

S. 55. Where the original offence is a misdemeanor, receivers may be prosecuted for a misdemeanor.

“verted, every such receiver shall be guilty of a misdemeanor, and may be indicted and convicted thereof, whether the person guilty of the principal misdemeanor shall or shall not have been previously convicted thereof, or shall or shall not be amenable to justice; and every such receiver shall, on conviction, be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years; and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit) in addition to such imprisonment.”

S. 56. Place of trial, &c. All receivers may be tried where the principal is triable, or where the property is found in their possession, as well as where the receiving takes place.

The 56th section enacts, “that if any person shall receive any chattel, money, valuable security, or other property whatsoever, knowing the same to have been feloniously or unlawfully stolen, taken, obtained, or converted, every such person, whether charged as an accessory after the fact to the felony, or with a substantive felony, or with a misdemeanor only, may be dealt with, indicted, tried and punished in any county or place in which he shall have, or shall have had any such property in his possession, or in any county or place in which the party guilty of the principal felony or misdemeanor may by law be tried, in the same manner as such receiver may be dealt with, indicted, tried, and punished in the county or place where he actually received such property.”

S. 76. Trial of persons receiving in one part of the United Kingdom, property stolen, &c. in any other part.

Section 76, after providing that nothing contained in the act shall extend to Scotland or Ireland except as follows, and then enacting as to trials in cases of larceny where the thief, having stolen, &c. property in one part of the kingdom, shall afterwards have the same property in his possession in any other part, further enacts, that “if any person in any one part of the United Kingdom shall receive or have any chattel, money, valuable security or other property whatsoever, which shall have been stolen or otherwise feloniously taken in any other part of the United Kingdom, such person knowing the said property to have been stolen or otherwise feloniously taken, he may be dealt with, indicted, tried, and punished for such offence in that part of the United Kingdom where he shall so receive or have the said property, in the same manner as if it had been originally stolen or taken in that part.”

S. 60. Receivers of property where the original offence is punishable on summary conviction.

The 60th section provides for the punishment of receivers where the stealing, &c. is punishable on summary conviction, and enacts, “that where the stealing or taking of any property whatsoever is by this act punishable on summary conviction, either for every offence, or for the first or second offence only, or for the first offence only, any person who shall receive any such property, knowing the same to be unlawfully come by, shall, on conviction thereof before a justice of the peace, be liable, for every first, second, or subsequent offence of receiving, to the same forfeiture and punishment to which a person guilty of a first, second, or subsequent offence of stealing or taking such property is by this act made liable.”

It should seem that the provisions of this statute will prevent a difficulty, which frequently occurred, in the prosecution of offenders, in consequence of the proof not corresponding with the charge in the indictment, either where the party, being charged as the

thief, turned out to have been the receiver, or, being charged as receiver, appeared upon the evidence to have actually stolen the property. It is conceived that where, from the nature of the case, it shall appear to be advisable, a count charging the party accused as a receiver may be joined in the same indictment with a count charging him as the thief, and that he may be convicted upon such of the counts as shall be supported by the evidence.

In some cases, upon the repealed statutes, the distinction between a receiver and an accomplice was the subject of attentive consideration.

Two prisoners, named Dyer and Disting, were indicted for stealing a quantity of barilla, the property of M. Hawker. Upon the evidence it appeared, that the barilla was on board a foreign ship at Plymouth, consigned to Hawker; that Hawker employed Dyer, who was the master of a large boat, for the purpose of bringing it on shore; and that Disting, together with several others, were employed as labourers in removing it to Hawker's warehouses, after it was landed. And the jury found that, while the barilla was in Dyer's boat, some of his servants, without his privity, consent, or participation, severed some of it from the rest where it was stowed, and removed it to another part of the boat, where they concealed it under some rope. But they also found, that Dyer afterwards assisted the other prisoner and the persons on board, who had before separated this part from the rest, *in removing it from the boat, for the purpose of carrying it off*. It was objected, for the prisoner Dyer, that his offence was not that of a principal, as laid in the indictment, but that of receiver or accessory after the fact. But the learned Judge, before whom the trial was had, was of opinion that, though for some purposes, as with respect to those concerned in the actual taking and separation, the offence would have been complete by the severance and removal of the barilla to another part of the boat, as being an asportation in point of law, yet, with respect to Dyer, who joined in the scheme before the barilla had been actually taken out of the boat, where it was properly deposited for the purpose of being landed, and who assisted in the act of carrying it off from thence, it was one continuing transaction, and could not be said to be completed till the removal of the commodity from such place of deposit; and that Dyer, having assisted in the act of carrying it off, was therefore guilty as principal. (b)

Another case arose out of the same transaction. It appeared, that the rest of the barilla was lodged in M. Hawker's warehouse; that while it was there, several persons, employed as labourers or servants by Hawker, entered into a conspiracy to steal some of it; that accordingly, some of them, who had access to the warehouse, removed a parcel of it nearer to the door than it was before, in the course of the morning; and that about nine at night these persons, together with the prisoners Atwell and O'Donnell, who had in the mean time agreed to purchase it of the others, came to

As to the distinction between a receiver and a principal thief.

Dyer and Disting's case.

Case of Atwell, O'Donnell, and others.

(b) *Rex v. Dyer and Disting, Exeter Sum. Ass. 1801, cor. Graham, B.*, who conferred with the other Judge, (Le Blanc, J.) and afterwards said that he

was fully satisfied that his opinion was well founded. 2 East. P. C. c. 16. s. 154. p. 767, 768.

the warehouse yard, and assisted the others, who took it out of the warehouse, in carrying it away from thence. They were all indicted as principals in the felony; and the same objection was made as before, that Atwell and O'Donnell were only receivers or accessories after the fact, the felony being complete before their participation in the transaction. But it was ruled that, so long as the goods remained in the warehouse, which was the lawful place of their deposit, although to some purposes, as to those who severed this parcel from the rest for the purpose of stealing it and more conveniently removing it afterwards, the felony might be said to be complete; yet it was a continuing transaction as to those who joined in the same plot before the goods were finally carried away from the premises: and that all the defendants, having concurred in, or being present at the act of removing them from the warehouse wherein they were lawfully deposited, were principals. (c)

King's case.

But where the goods had been so entirely taken away from the premises or actual possession of the owner, that their further removal could not be deemed a continuing part of the original taking, the case was holden to come under a different consideration; and the party concerned only in such further removal was decided not to be guilty of stealing the goods. Upon an indictment for larceny, in stealing several firkins of butter and some cheeses, the facts proved were, that two men, in the absence of the prisoner, broke open the warehouse of the prosecutor, stole the butter and cheese in question, carried them into the adjoining street, and deposited them at a distance of about thirty yards from the door of the warehouse: after which they went for the prisoner, brought him to the place, and informed him of what they had done; and he assisted in carrying the property to a cart, which was kept in waiting at some distance to be ready to convey it away. Upon this evidence an objection was taken on behalf of the prisoner, that he could not be found guilty of stealing in this case, as the felonious taking of the property was complete before he had any part in the transaction. It seemed however, in the first instance, to the learned Judge by whom the prisoner was tried, that he might properly be found guilty; on the ground that as every continuation of a larceny is so far a new larceny, and a new taking, as to sustain an indictment for larceny in any county into which the property is carried, and as the possession in law of the property in this case remained in the prosecutor, notwithstanding the removal of it from his warehouse to the place where it was deposited in the street, so that he might have brought trespass against any stranger taking it from the place in the street without any felonious intent; it might be considered that the prisoner, who was present aiding and abetting in a continuation of the larceny, was a principal in the larceny so continued: and the prisoner was accordingly convicted. But, the case being reserved for the consideration of the twelve Judges,

(c) *Rex v. Atwell, O'Donnell, and others, cor. Graham, B.*, at the same time as the preceding case of *Dyer and Disting*, and decided after the like consideration. *Ante*, note (b) 2 East.

P. C. Ibid. All the prisoners found guilty on both indictments as principals in the two several transactions received sentence of transportation for seven years.

they were of opinion, that as the property was removed from the owner's premises before the prisoner was present, he could not be considered as a principal; and that the conviction of him as a principal was therefore wrong. (d) So going towards the place where a felony was to be committed in order to assist in carrying off the property, and assisting accordingly, was held not to make the party a principal, if he was at such a distance at the time of the felonious taking as not to be able to assist in it. The prisoner, and J. S., went to steal two horses; J. S. left the prisoner half a mile from the place in which the horses were, and brought the horses to him, and both rode away with them. Upon a case reserved, the Judges thought the prisoner an accessory only, not a principal, because he was not present at the original taking. (e) But where a man committed a larceny in a room of a house, in which room he lodged, and threw a bundle containing the stolen property out of the window to an accomplice who was waiting to receive it, the Judges came to a different conclusion, and held that such accomplice was a principal, and that the conviction of him as a receiver was wrong. (f)

It was settled upon the repealed statutes, that a party might be indicted for receiving goods stolen by persons unknown: and where an indictment was objected to because it did not ascertain the principal thief, and did not therefore state to whom in particular the prisoner was accessory, the Judges were unanimously of opinion that it was good; the great view of the statutes being to reach the receivers, where the principal thieves could not easily be discovered. (g) But where the principal was known, it was considered to be proper to state the facts according to the truth. (h) And a case is reported in which it was ruled, that an indictment against an accessory before the fact to a larceny, which stated a stealing by "a certain person to the jurors unknown," and that the prisoner incited, &c. "the said person unknown" to commit the said felony, could not be supported where the principal felon was a witness before the grand jury. The counsel for the prosecution, in opening the case, stated that the grand jury had found the bill upon the evidence of the principal, who acknowledged that he had stolen the goods in question, and proposed to call the principal as a witness to establish the guilt of the prisoner. But Le Blanc, J., interposed, and directed an acquittal. He said, he considered the indictment wrong, in stating that the wheat had been stolen *by a person unknown*; and asked, how the person who was the principal felon could be alleged to be unknown to the jurors, when they had him before

A party may be indicted for receiving goods stolen by persons unknown.

But where the principal is known, it should be so stated.

(d) *Rex v. King*, cor. Bayley, J., *York Lent Ass.* 1817. And before the Judges in *East. T.* 1817, *Russ. & Ry.* 332. And see *Rex v. M'Makin* and *Smith*, *Russ. & Ry.* 333 note (b).

(e) *Rex v. Kelly*, *Mich. T.* 1820, *MS. Bayley, J.*, and *Russ. & Ry.* 421. And see *ante*, Vol. I. Book I. Chap. 2. p. 23.

(f) *Rex v. Owen*, *East. T.* 1825, *Ry. & Mood. C. C. R.* 96. *Ante*,

Vol. I. Book I. Chap. 2. p. 23.

(g) *Thomas's case*, *O. B.* 1766. 2 *East. P. C. c.* 16. s. 164. p. 781.

(h) 2 *East. P. C. c.* 16. s. 164. p. 781. And see *ante*, 162. that though in an indictment for larceny, the goods may be laid to be the property of persons unknown, yet such an allegation will be improper if the owner be really known.

them, and his name was written on the back of the bill? (i) Where however two bills of indictment had been found by the same grand jury, one of which charged the prisoner with receiving goods stolen by a person unknown, and the other charged him with receiving the same goods stolen by one H. Moreton, and the prisoner was tried on the first mentioned indictment, the counsel for the prosecutor having declined to proceed upon the other against H. Moreton, and objection was taken that the allegations of the person who committed the principal felony being unknown to the grand jury was negatived by the other record, the Judges (upon the point being reserved for their consideration) held the conviction right. They were of opinion that the finding by the grand jury of the bill imputing the principal felony to H. Moreton, was no objection to the second indictment, although that indictment stated the principal felony to have been committed by a person to the jurors unknown. (k)

It is sufficient to state the conviction, without stating the *attainder* of the principal.

In an indictment against a receiver, as an accessory after the fact to the felony, where the principal had been convicted, it was decided to be sufficient to state the *conviction*, without stating the *attainder* of the principal. In a case where it was moved in arrest of judgment that the indictment was bad because it did not state that the principal was *attainted*, the point was reserved for the consideration of the Judges; who all held that the indictment was good, upon reference to a great number of precedents, and on a consideration of the statute 1 Anne, st. 2. c. 9. s. 1, 2. (l) In a subsequent case, where the prisoner was charged with knowingly receiving stolen goods, the indictment stated that the goods had been stolen by Isaac Powell, who had been *duly convicted* of the felony at the great session for Brecon. An examined copy of the record of Powell's conviction was produced, which stated that the prisoner was asked if he was (not is) guilty; and it did not state that issue was joined, or how the jurors were returned, and the only award against the prisoner was, that he should be in mercy, &c. It was objected that this entry was not sufficiently formal and correct to support the averment that Powell had been *duly convicted*. But the learned Judge ruled, that the judgment was not necessary, and might be rejected: that the conviction was sufficient; that in the common case, where the receiver is tried with the thief, there is no judgment on the thief, before the verdict against the receiver; and that although this record was full of errors, yet an erroneous attainder of the principal was sufficient against the accessory until it was reversed. (m) And the Judges held, that the objections to the copy of the record produced were not material. (n)

7 G. 4. c. 64. s. 11. accessories to suffer the same pun-

The statute 7 Geo. 4. c. 64. s. 11. in order that all accessories may be convicted and punished in cases where the principal felon is *not attainted*, enacts "that if any principal offender shall be in

(i) *Rex v. Walker*, 3 Campb. 264. And S. P. by Dallas, J. Auon. Worcester Lent. Ass. 1815.

(k) *Rex v. Bush*, Mich. T. 1818, Russ. & Ry. 372.

(l) Hyman's case, 2 Leach 925. 2

East. P. C. c. 16. s. 164. p. 782.

(m) *Rex v. Baldwin*, cor. Thomson, B., Monmouth Sum. Ass. 1812. 3 Campb. 265. MS. Bayley, J.

(n) Mich. T. 1812, MS. Bayley, J., Russ. & Ry. 241.

"anywise convicted of any felony, it shall be lawful to proceed against any accessory, either before or after the fact, in the same manner as if such principal felon had been attainted thereof, notwithstanding such principal felon shall die, or be admitted to the benefit of clergy, or pardoned, or otherwise delivered before attainder; and every such accessory shall suffer the same punishment, if he or she be in anywise convicted, as he or she should have suffered if the principal had been attainted."

ishment though principals not attainted.

The indictment against the receiver of stolen goods, charging him as an accessory, need not allege time and place to the fact of stealing the goods; a statement of them to the offence of the receiver will be sufficient. (o) And in a case where an indictment charged the prisoner by the name of Francis Morris, with receiving stolen goods, "he the said Thomas Morris knowing, &c." it was holden that the words "the said Thomas Morris" might be rejected as surplusage. (p) It is sufficient if the thing received be the same in fact as that which was stolen, though passing under a new denomination; so that where the indictment charged the principal with stealing a live sheep, and the accessory with receiving "twenty pounds of mutton, part of the goods," &c. the conviction was holden to be proper. (q) The averment of the guilty knowledge, which is the gist of the offence, should be correctly made; as where an indictment against a receiver who was tried with the principal contained a defective statement, that the receiver knew the goods to have stolen (omitting the word "been,") the Judges thought the indictment bad, this being the gist of the offence; but they afterwards took time to consider. (r)

The indictment need not state time, place, &c. and the thing received may be stated under a different denomination from that which was stolen if the same in fact.

The necessary evidence of the offender knowing the goods which he has received to have been originally stolen may be collected from the circumstances of the particular case; and it is said, that the buying goods at an under value is presumptive evidence that the buyer knew they were stolen. (s) In those cases where it is necessary to prove that the principal has been duly convicted, we have seen that it appears to have been ruled to be sufficient to give in evidence the examined copy of a record, shewing that he was found guilty of the felony before a court of competent jurisdiction, though the proceedings be informal, and the judgment erroneous. (t)

Evidence of guilty knowledge: and of the principal having been convicted.

In prosecutions for the *misdemeanor* in receiving stolen goods, on the repealed statute 22 Geo. 3. c. 58. it was settled that the principal felon, though not convicted or pardoned, was a competent witness against the receiver. (u)

Principal felon a witness in prosecutions on the 22 G. 3. c. 58.

(o) Stott's case, 2 East. P. C. c. 16. s. 144. p. 753. and s. 163. p. 780.

2 East. P. C. c. 16. s. 48. p. 617.

(p) Morris's case, 1 Leach 109. And see also Redman's case, 1 Leach 477. where words which obstructed the sense of an indictment on the statutes 3 W. & M. c. 9. s. 4. and 5 Ann. c. 31. s. 5. were rejected as insensible and useless.

(r) Rex v. Kernon, Hil. T. 1788, MS. Bayley, J.

(s) 1 Hale 619. 2 East. P. C. c. 16. s. 153. p. 765.

(t) Ante, 258. Rex v. Baldwin, 3 Campb. 265.

(g) Rex v. Cowell and Green, 1796.

(u) Haslam's case, O. B. 1786, and before the twelve Judges, 1 Leach 418. 2 East. P. C. c. 16. s. 166. p.

The receiver may controvert the guilt of the principal.

In cases where the principal and receiver are joined in the same indictment, and tried together, there is no doubt that the receiver may enter into the full defence of the principal, and avail himself of every matter of fact and every point of law tending to his acquittal; and in cases where the principal has been previously convicted, though the record of the conviction will be sufficient presumptive evidence that every thing in the former proceeding was rightly and properly transacted, yet, according to great authority, it is competent to the receiver to controvert the guilt of the principal, and to shew that the offence, of which he was convicted, did not amount to felony in him, or not to that species of felony with which he was charged. (x)

Restitution of stolen property. The owner of stolen property prosecuting thief or receiver to conviction, shall have restitution of his property.

As to the restitution of the stolen property upon the conviction of the receiver, the statute 7 & 8 Geo. 4. c. 29. s. 57., in order to encourage the prosecution of offenders, enacts, "that if any person, guilty of any such felony or misdemeanor as aforesaid, in stealing, taking, obtaining, or converting, or in knowingly receiving any chattel, money, valuable security, or other property whatsoever, shall be indicted for any such offence, by or on the behalf of the owner of the property, or his executor or administrator, and convicted thereof, in such case the property shall be restored to the owner or his representative; and the court, before whom any such person shall be so convicted, shall have power to award from time to time writs of restitution for the said property, or to order the restitution thereof in a summary manner: provided always, that if it shall appear before any award or order made, that any valuable security shall have been *bond fide* paid or discharged by some person or body corporate liable to the payment thereof, or being a negotiable instrument shall have been *bond fide* taken or received by transfer or delivery, by some person or body corporate, for a just and valuable consideration, without any notice, or without any reasonable cause to suspect that the same had by any felony or misdemeanor been stolen, taken, obtained, or converted as aforesaid, in such case the Court shall not award or order the restitution of such security."

Exception.

782. Patram's case, *cor.* Grose, J.,
Bridgwater Sum. Ass. 1787, 1 Leach
419. note (g). 2 East. P. C. *ibid.*

(x) Post. 365. Smith's Case, O. B.
1783, 1 Leach 288. *Ante*, Vol. I. p.
39, 40.

CHAPTER THE TWENTY-EIGHTH.

OF TAKING A REWARD FOR HELPING TO THE DISCOVERY OF STOLEN PROPERTY.

AN offence nearly connected with that of receiving stolen goods, is that of taking a reward to help any person to goods which have been stolen.

The statute 7 & 8 Geo. 4. c. 29. s. 58. enacts, "that every person who shall corruptly take any money or reward, directly or indirectly, under pretence or upon account of helping any person to any chattel, money, valuable security, or other property whatsoever, which shall by any felony or misdemeanor have been stolen, taken, obtained, or converted as aforesaid, shall (unless he cause the offender to be apprehended and brought to trial for the same) be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, and, if a male, to be once, twice, or thrice publicly or privately whipped (if the Court shall so think fit), in addition to such imprisonment."

In a case upon a statute relating to the same subject, 4 Geo. 1. c. 11., now repealed by 7 & 8 Geo. 4. c. 27., it was considered proper to aver, that the defendant had not apprehended or caused to be apprehended the principal, &c., such reservation being in the enacting clause, and part of the description of the offence. (a) In a case where the principal felon was dead, and had not been convicted of the offence, it was objected that the person receiving the reward to help to the stolen goods could not be convicted. The point was reserved as one of great importance, and of the first impression, for the consideration of the Judges: but their opinion was never publicly communicated, though it was presumed, from the prisoner being discharged after remaining some time in gaol, that the objection prevailed. (b) With respect, however, to another objection, that the principal

Offence of taking a reward to help to stolen goods.

7 & 8 G. 4. c. 29. s. 58. Taking a reward for helping to the recovery of stolen property, without bringing the offender to trial, a misdemeanor.

As to the averment that the offender "had not apprehended, nor caused to be apprehended, the principal, &c." And as to the conviction of the principal felon.

(a) 2 East. P. C. c. 16. s. 155. p. 771. p. 770. And see Wild's case on the statute 5 Anne, c. 31. s. 6. 2 East.

(b) Drinkwater's case, 1740. 1 P. C. c. 16. s. 142. p. 746. Leach 15. 2 East. P. C. c. 16. s. 155.

felon had not been convicted of the offence, it was well observed that this could not have been the ground of the prisoner's discharge, inasmuch as the statute, by the very terms of it, precluded the supposition of a conviction of the principal being a necessary preliminary to the trial and punishment of the offender; for it stated that the offender should be guilty of felony, &c. unless he did "apprehend, or cause to be apprehended, the felon who stole the goods, and cause such felon to be brought to his trial for the same, and give evidence against him." And it was therefore suggested, that the true ground of the doubt was, that by the death of the principal the *stipulated condition had become impossible to be performed* without any default of the defendant. (c)

The principal felon may be a witness against the party indicted for taking the reward.

There is also a case upon the repealed statute, where the principal felon not only was not convicted, but was admitted as a witness against the party indicted for taking the reward; namely, the case of the notorious Jonathan Wild, whose extensive traffic in the taking of such rewards is said to have been the occasion of the passing of this clause in the repealed statute. (d) The prisoner was first indicted on the statute 10 & 11 W. 3. c. 23. (now repealed) for privately stealing a box of lace in a shop, and acquitted, upon its appearing from the testimony of one Kelly, who had actually stolen the box, and who was admitted as a witness for the crown, that the prisoner was not in the shop at the time, but only waited at the corner of the street to receive the goods; but immediately upon this acquittal he was again arraigned, tried, and convicted, on the statute in question, 4 Geo. 1. c. 11. s. 4. for receiving ten guineas from the owner of the shop as a reward for helping her to the box of lace so stolen by Kelly; and Kelly was again examined as a witness on the part of the crown on this indictment. (e)

In a late case it was held to be an offence within this act of 4 Geo. 1. c. 11. s. 4., (now repealed) to take money under pretence of helping a man to goods stolen from him, though the prisoner had no acquaintance with the felon, and did not pretend that he had, and though he had no power to apprehend the felon, and though the goods were never restored, and the prisoner had no power to restore them. (f)

7 & 8 Geo. 4. c. 29. s. 59., advertizing a reward for the return of stolen property, &c. made liable to a penalty of 50*l*.

As a further means of putting a stop to this pernicious traffic in stolen goods, it is enacted by 7 & 8 Geo. 4. c. 29. s. 59., "that if any person shall publicly advertise a reward for the return of any property whatsoever, which shall have been stolen or lost, and shall in such advertisement use any words purporting that no questions will be asked, or shall make use of any words in any public advertisement purporting that a reward will be given or paid for any property which shall have

(c) 2 East. P. C. c. 16. s. 155. p. 770.

(d) 4 Black. Com. 132.

(e) Wild's (Jonathan) case, 1725, 1 Leach 17. note (a). 2 East P. C. c. 16. s. 155. p. 770. 4 Black. Com.

132. The prisoner was executed upon this conviction. See also as to the point of the principal felon being a witness, *ante*, Haslam's case, p. 259.

(f) Rex v. Ledbitter, Ry. & Mood. C. C. 76.

“ been stolen or lost, without seizing or making any enquiry after
“ the person producing such 'property, or shall promise or offer
“ in any such public advertisement to return to any pawnbroker
“ or other person who may have bought or advanced money by
“ way of loan upon any property stolen or lost, the money so paid
“ or advanced, or any other sum of money or reward for the
“ return of such property, or if any person shall print or publish
“ any such advertisement, in any of the above cases every such
“ person shall forfeit the sum of fifty pounds for every such
“ offence, to any person who will sue for the same by action of
“ debt, to be recovered with full costs of suit.”

CHAPTER THE TWENTY-NINTH.

OF UNLAWFULLY RECEIVING OR HAVING POSSESSION OF PUBLIC STORES.

THE several statutes relating to the offences mentioned in the title to this Chapter will be set forth, in the first instance, in the order in which they were passed; and the few decided cases which have occurred upon their construction will be subsequently noticed.

9 & 10 W. 3.
c. 41. s. 1.
Recital of the
frequent em-
bezzlement of
stores, and
the difficulty
of convicting
offenders.

Enactment
that it shall
not be lawful
for persons
(except those
authorized)
to make any
stores with
the marks
used upon the
King's stores,
upon pain of
forfeiting the
goods, and
200*l.*, &c.

The statute 9 & 10 W. 3. c. 41. s. 1. (a) recites, that notwithstanding divers good laws made and enacted for the preventing of the stealing and embezzlement of his Majesty's stores of war, and naval stores, those frauds, thefts, and embezzlements were frequently practised, and the convicting of such offenders was rendered difficult and impracticable, by reason that it rarely happened that direct proof could be made of such offenders' immediate taking, embezzling, or carrying away such stores from the places for keeping and preserving the same, but only that such goods were marked with the King's mark, and found in the custody and possession of the said person accused for stealing or embezzling the same: and it then enacts, "that it shall not be lawful to or for
" any person or persons whatsoever, other than persons autho-
" rized by contracting with his Majesty's principal officers or
" commissioners of the navy, ordnance, or victualling office for
" his Majesty's use, to make any stores of war, or naval stores
" whatsoever, with the marks usually used to and marked upon
" his Majesty's said warlike and naval or ordnance stores; that
" is to say, any cordage of three inches and upwards, wrought
" with a white thread laid the contrary way, or any smaller
" cordage, to wit, from three inches downwards, with a twine in
" lieu of a white thread, laid to the contrary way as aforesaid, or
" any canvass, wrought or unwrought, with a blue streak in the
" middle, or any other stores with the broad arrow, by stamp,
" brand, or otherwise, upon pain that every such person or per-
" sons, who shall make such goods so marked as aforesaid, not
" being a contractor with his Majesty's principal officers or com-
" missioners of the navy, ordnance, or victuallers for his Majesty's
" use, or employed by such contractor for that purpose as afore-

(a) Made a public act by 1 Geo. 1. st. 2. c. 25. s. 14.

“said, shall for every such offence forfeit such goods, and the sum of two hundred pounds, together with costs of suit;” one moiety whereof to his Majesty, and the other moiety to the informer, to be recovered by action of debt, &c. in any court of record at *Westminster*.

And the second section enacts, “that such person or persons, in whose custody, possession, or keeping such goods or stores marked as aforesaid shall be found, not being employed as aforesaid, and such person or persons who shall conceal such goods or stores marked as aforesaid, being indicted and convicted of such concealment, or of the having such goods found in his custody, possession, or keeping, shall forfeit such goods, and the sum of two hundred pounds, together with the costs of prosecution, one moiety to his Majesty, and the other moiety to the informer, to be recovered as aforesaid, and shall also suffer imprisonment, until payment and performance of the said forfeiture, unless such person shall, upon his trial, produce a certificate under the hand of three or more of his Majesty’s principal officers or commissioners of the navy, ordnance, or victuallers, expressing the numbers, quantities, or weights of such goods, as he or she shall then be indicted for, and the occasion and reason of such goods coming to his or her hands or possession.”

But the statute provides, that the principal officers or commissioners of the navy, &c. may sell and dispose of any of the stores so marked, as they might have done before; and that persons buying such stores of the principal officers, &c. or by their order, may keep the same without incurring any penalty, upon producing a certificate or certificates under the hand and seal of three or more of the said principal officers, &c. that they bought such goods from them, or from persons who did buy the said stores from the said principal officers, &c. at any time before such stores were found in their custody. (b) And also, that the act shall not hinder any of the principal officers, &c. or any chief commander of any of his Majesty’s ships at sea, to lend any stores to any merchant ship or vessel in distress, or otherwise, as might lawfully be done before the act; in case the goods so lent be restored with all possible conveniency, and provided the persons borrowing have such certificate as before-mentioned, which the said principal officers, &c. or commander-in-chief are required to give to the party borrowing. (c)

The statute 1 Geo. 1. st. 2. c. 25. s. 3. recites, that his Majesty’s stores and ammunition pertaining to his navy and shipping or service thereof were often privately embezzled or filched away; and enacts, that the principal officers and commissioners of the navy, or any one or more of them, shall have power to enquire,

S. 2. Persons in whose possession stores so marked shall be found, and persons concealing such stores, shall forfeit the goods and 200*l.*, &c. and be imprisoned till payment.

S. 4. Provision that the commissioners of the navy, &c. may sell stores; and buyers secured from the penalty by a certificate.

S. 8. The act not to hinder officers, &c. from lending stores to vessels in distress with a certificate, &c.

1 Geo. 1. st. 2. c. 25. s. 3. empowers the principal officers, &c. of the navy to search for em-

(b) S. 4. As to the form of the certificate the section further enacts, “in which certificate or certificates the quantities of such stores shall be expressed, and the time when and where bought of the said commissioners.” And it empowers the

commissioners or any three of them, from time to time, to give to persons who shall desire the same, and shall have bought any of the said stores, within thirty days after the sale and delivery of the stores.

(c) S. 8.

bezzled stores, and punish offenders by fine and imprisonment, the value of the goods embezzled not exceeding 20s.; and to commit the offender to answer, &c. where the offence is of a higher nature.

S. 4. gives a summary jurisdiction to the treasurer, &c. where the goods are under 20s.

9 Geo. 1. c. 8. s. 3. Persons having or concealing marked timber, &c. to suffer as in case of having or concealing other stores.

S. 4. gives a power to mitigate penalties.

and by warrant under hand and seal, to empower any person or persons to search for the same in all places, as justices of peace may do in case of felony, "and punish the offenders by such fine "and imprisonment, as aforesaid, (d) the value of the goods so "embezzled or filched away, not exceeding the sum of twenty "shillings, and cause the goods to be brought in again; and if "the offence be of such a nature as doth require an higher and "severer punishment, then that they, any one or more of them, "may commit such offender to the next gaol, or to the custody "of their messenger or messengers aforesaid, till he or they "offending enter into recognizance with surety or sureties, according to the nature of the offence, to appear and answer to "the same in his Majesty's Court of Exchequer, or other Court "where his Majesty shall question him or them for the same, "within one year following, on process duly served for that purpose on such offender or offenders."

By the fourth section of this statute a summary jurisdiction is given to the treasurer and certain other officers of the navy, therein mentioned, to punish by fine and imprisonment, where the goods so embezzled are under the value of twenty shillings.

The statute 9 Geo. 1. c. 8. s. 3. recites the provisions of the 9 & 10 W. 3. c. 41. s. 2. and that it was necessary to give power to mitigate the penalties therein mentioned, and to explain and amend the act: and then enacts, "that if any person or persons "shall be lawfully convicted of having in his, her or their custody, any timber, thick stuff or plank, marked with the broad arrow, by stamp, brand, or otherwise, or of concealing any "timber, thick stuff or plank so marked, every such person so "offending shall suffer, forfeit, and pay, as for having, keeping "or concealing any other warlike, naval or ordnance stores contrary to the said act."

The fourth section provides, that it shall be lawful "for any "Judge, justice or justices, before whom any offender or offenders "shall be convicted of any of the crimes or offences before recited, enacted or mentioned in this act, to mitigate the penalty for "the same, as he or they shall see cause, and to commit the offender or offenders, so convicted, to the common gaol of the "county or place where the offence shall be committed, there to "remain without bail or mainprize, until payment be made of the

(d) This refers to the first section of the act, which, with respect to the fine and imprisonment, enacts as follows: "the fine not exceeding twenty "shillings, and imprisonment not exceeding one week; and have power "in such cases, to commit such person to the next gaol, or to the custody of the messenger or messengers for the time being attendant on them, who respectively are to receive and detain such persons so offending; and that the said principal officers and commissioners, or "any one or more of them then present, have hereby power and autho-

"rity to discharge such fine or imprisonment, if they think fit, and "for non-payment of the fine so imposed and not remitted, to imprison "the party offending until payment "thereof, or otherwise to cause such "offender or offenders to be sent to "the next house of correction to the place where such offence shall be committed, there to be kept at "hard labour for the space of two "months, without bail or mainprize, "which said fines shall be paid to the clerk of the chest at Chatham for "the use of the maimed seamen."

“penalty and forfeiture imposed by this or the said former act, or
 “mitigated as aforesaid, or to punish such offender or offenders
 “corporally, by causing him, her or them to be publicly whipped,
 “or committed to some public work-house, there to be kept to
 “hard labour for the space of six months or a less time, as to such
 “Judge, justice or justices, in his or their discretion, shall seem
 “meet: any thing in the said recited act, or in any other act to
 “the contrary notwithstanding.”

The succeeding section enacts, that where any dispute shall arise between the persons on whose informations on oath persons offending in the premises, or against the said former act, shall be prosecuted and convicted, touching the right to the forfeitures or penalties, the Judge or justices before whom the offender shall be convicted shall examine and finally determine the matter.

The statute 17 Geo. 2. c. 40. s. 10. recites the statute 9 & 10 W. 3. c. 41. and the 9 Geo. 1. c. 8. s. 3, 4, 5. and that doubts had arisen touching the method of trial and punishment of offenders against those acts, whether they might be indicted and tried for the offences, and whether any Judge, justice of assise, or justices of the peace at sessions, might hear, try, and determine the same, and on conviction set such fine, or mitigate the same and the forfeitures, &c. or whether such offenders, in order for recovering the said forfeitures, &c. could only be proceeded against by action of debt, bill, &c. in a court of record at Westminster; and then declares and enacts, “that it shall and may be lawful to and for any
 “Judge, justice or justices at the assises, or justices of the peace
 “at the general quarter sessions to be holden for any county,
 “city, borough, or town corporate, to hear, try, and determine
 “by indictment or otherwise, all or any the crimes or offences
 “mentioned in the said recited acts; and that the said Judge,
 “justice or justices of assise or justices of the peace as aforesaid,
 “before whom such offender or offenders shall be indicted or
 “tried, and convicted of all or any the crimes or offences in the
 “said recited acts mentioned, may impose any fine, not exceeding
 “the sum of two hundred pounds, on such offender or offenders
 “(one moiety to be paid to his majesty, and the other moiety to
 “the informer;) and may mitigate the said penalty and forfeitures
 “inflicted by the said recited acts or either of them, and to com-
 “mit the offender or offenders so convicted and fined, to the com-
 “mon gaol of the county or place where the offence shall be com-
 “mitted, there to remain without bail or mainprize, until payment
 “be made of the penalty and forfeitures imposed by this or the
 “said former acts, or mitigated as aforesaid; or in lieu thereof,
 “to punish such offender or offenders in the premises corporally,
 “by causing him, her or them to be publicly whipped, and com-
 “mitted to some house of correction or public work-house, there
 “to be kept to hard labour for the space of three months or less
 “time, as to such Judge, justice or justices of assise or justices of
 “the peace, shall in his or their discretion, seem meet.”

The 39 & 40 Geo. 3. c. 89. a principal statute upon this subject, and intituled, “An act for the better preventing the embezzlement of his majesty’s naval, ordnance, and victualling stores,”

S. 5. as to disputes concerning penalties.

17 Geo. 2. c. 40. recites the 9 & 10 W. 3. c. 41. and 9 Geo. 1. c. 8. and doubts which had arisen upon those statutes;

And enacts, that Judges at the assises and justices at sessions may try by indictment any offences mentioned in those statutes, and may fine, &c. or in lieu thereof punish corporally.

39 & 40 G. 3. c. 89. s. 1. recites a statute 22 Car. 2. c. 5.

and also the 9 & 10 W. 3. c. 41. 9 Geo. 1. c. 8. and 17 Geo. 2. c. 40. and the necessity of further prevention of the embezzling of stores: and enacts that persons knowingly selling, receiving, &c. *marked* stores (being new, or only one third worn;) and persons concealing such stores, shall be deemed receivers of stolen goods, and be transported for fourteen years, unless they produce a certificate.

S. 2. And persons having possession of certain articles *marked*, &c. but not new, &c. and persons convicted of any offence contrary to the 9 & 10 W. 3. c. 41. shall, besides forfeiting such stores, and two hundred pounds, be corporally punished.

recites a statute 22 Car. 2. c. 5. (i) and also the statutes 9 & 10 W. 3. c. 41. s. 2. 9 Geo. 1. c. 8. s. 3, 4. and 17 Geo. 2. c. 40. s. 10. and further recites, that it was become necessary to make some further and more effectual provision for preventing the wicked practices of the stealers, embezzlers, and receivers, of his majesty's warlike and naval, ordnance, and victualling stores: and then enacts, "that every person or persons (such person or persons not being a contractor or contractors, or employed as in the said recited act, 9 & 10 W. 3. c. 41. is mentioned) who shall willingly or knowingly sell or deliver, or cause or procure to be sold or delivered to any person or persons whomsoever, or who shall willingly or knowingly receive or have in his, her or their custody, possession or keeping, any stores of war, or naval ordnance or victualling stores, or any goods whatsoever, marked as in the said recited acts are expressed, or any canvass marked either with a blue streak in the middle, or with a blue streak in a serpentine form, or any bewper, otherwise called buntin, wrought with one or more streaks of raised tape (the said stores of war, or naval, ordnance or victualling stores or goods above mentioned, or any of them, being in a raw or unconverted state, or being new or not more than one third worn) and such person or persons who shall conceal such stores or goods or any of them, marked as aforesaid, shall be deemed receivers of stolen goods, knowing them to have been stolen, and shall, on being convicted thereof in due form of law, be transported beyond the seas for the term of fourteen years, in like manner as other receivers of stolen goods are directed to be transported by the laws and statutes of this realm, unless such person or persons shall, upon his, her, or their trial, produce a certificate under the hands of three or more of his majesty's principal officers or commissioners of the navy, ordnance or victualling, expressing the numbers, quantities or weights of such stores or goods as he, she or they shall then be indicted for, and the occasion and reason of such stores or goods coming to his, her or their hands or possession."

The second section enacts, "that such person or persons (not being a contractor or contractors, or employed as aforesaid) in whose custody, possession or keeping any of the said stores called canvass, marked with a blue streak in a serpentine form, or bewper, otherwise called buntin, wrought as above-mentioned, shall be found, (such canvass or bewper, otherwise called buntin, not being charged to be new, or not more than one-third worn) and all and every person and persons who shall be convicted of any offence contrary to so much of the said recited act of the 9 & 10 W. 3. as relates to the making or the having in possession or concealing any of his Majesty's warlike, or naval or ordnance stores, marked as therein specified, shall, besides forfeiting such stores, and the sum of two hundred pounds, together with costs of suit as therein mentioned, be corporally punished by pillory, (f) whipping, and imprison-

(i) Now repealed by 7 & 8 Geo. 4. c. 27.

(f) But as to the pillory, see now the statute 56 Geo. 3. c. 138.

“ment, or by any or either of the said ways and means, in such manner, and for such space of time as to the Judge or justices, before whom such offender or offenders shall be convicted, shall seem meet, any thing in the said last-mentioned act, or in the before recited acts of 9 Geo. 1. and 17 Geo. 2., to the contrary thereof, in any wise notwithstanding: provided always, that it shall and may be lawful to and for such Judge or justices to mitigate the said penalty of two hundred pounds, as he or they shall see cause.”

It is then provided by the third section, that nothing in this act, or in the said recited act of the 9 & 10 W. 3. contained, shall extend to exempt from the operation of this act, or the said recited act, respectively, “any person or persons being a contractor or contractors, or employed as in the said last-mentioned act is mentioned, except only so far as concerns stores or goods marked as aforesaid, which shall be *bond fide* provided, made up or manufactured by such person or persons, or by their order, and which shall not have been before delivered into his Majesty’s store, unless, having been so delivered, they shall have been sold or returned to such person or persons by the commissioners of his Majesty’s navy, ordnance, or victualling respectively.”

The fourth section enacts, “that if any person or persons shall wilfully and fraudulently destroy, beat out, take out, cut out, deface, obliterate, or erase, wholly or in part, any of the marks in the said act of the 9 & 10 W. 3., or in this act mentioned, or any other mark whatsoever, denoting the property of his Majesty, his heirs or successors, in or to any warlike or naval, ordnance or victualling stores, or cause, procure, employ, or direct any other person or persons so to do, for the purpose of concealing his Majesty’s property in such stores, such person or persons shall be deemed guilty of felony, and shall, on being convicted thereof, be transported to parts beyond the seas for the term of fourteen years, in like manner as other felons are directed to be transported by the laws and statutes of this realm.”

The fifth section enacts, “that if any person or persons who shall hereafter be convicted of any offence contrary to this act, for which he shall not have been transported beyond the seas, or contrary to the said recited act of 9 & 10 W. 3. shall be guilty of a second offence, either contrary to that act or to this present act, which would not otherwise, as the first offence, subject him her or them to transportation, and shall be thereof legally convicted, such person or persons shall, by judgment of the Court wherein he she or they shall be so convicted, be transported to parts beyond the seas for the term of fourteen years, in like manner as other offenders may be transported by the laws and statutes of this realm now in force.”

The sixth section enacts, “that if any person or persons transported in pursuance of this act shall return into any part of *Great Britain or Ireland* before the end or expiration of the term for which he or she shall have been so transported, every such person or persons so returning shall suffer as felons, and

S. 3. As to the exemption of contractors.

S. 4. Persons defacing the marks, denoting the King’s property in stores, made guilty of felony, punishable by transportation for fourteen years.

S. 5. Offenders not having been transported, and offending a second time, are to be transported for fourteen years.

S. 6. Persons returning from transportation before their time, excluded from clergy.

S. 7. provides for the mitigation of punishment by the Court before which any offender is convicted.

S. 8, 9, 10.—
Rewards.

S. 11. empowers any commissioner of the navy, &c. to issue a warrant to search for concealed stores, and to bring the same and the offender before them, and to commit, &c. and if the party in whose possession the stores were found, do not satisfactorily account for them, such stores are to be forfeited, and the party to be deemed guilty of a misdemeanor.

S. 12, 13.
Barges, boats,
&c. and per-

"shall have execution awarded against him her or them, as persons attainted of felony, without benefit of clergy."

By the seventh section, provision is made for the mitigation of punishment, by the Court before which any offender is convicted. It enacts, "that it shall and may be lawful to and for the Court before whom any offender or offenders shall be indicted and convicted of all or any of the crimes or offences hereinbefore-mentioned to be punishable with transportation, to mitigate or commute such punishment, by causing the offender or offenders to be set on the pillory, (g) publicly whipt, fined, or imprisoned, or by all or any one or more of the said ways and means, as such Court in its discretion shall think fit; one moiety of which fine (if any imposed) shall be to his Majesty, and the other moiety thereof to the informer, and also to order such offender or offenders to be imprisoned until such fine be paid."

The three succeeding sections of the act relate to rewards to be given to persons discovering or apprehending offenders, and the mode in which they shall be distributed and paid.

The eleventh section enacts, that any commissioner of the navy, ordnance, or victualling, for the time being, (who is authorized for these purposes to act as a justice of peace for the county, &c.) (h) or any justice of peace may, upon the oath of a credible person, that there is reason to suspect that any stores, &c. are concealed, by warrant under hand and seal, cause the place to be searched in the day time, by a peace officer, and in case any stores, &c. marked as mentioned either in this act, or the 9 & 10 W. 3. c. 41. shall be found, cause the same, and the offenders to be brought before them, and commit, bind over, or otherwise deal with such offenders according to law: and it then enacts, "that in case upon any such search, or upon any seizure whatsoever of stores or goods, marked as aforesaid, any naval, ordnance, or victualling stores, not so marked as aforesaid, shall be found, which may reasonably be suspected to belong to his Majesty, the party or parties in whose possession or keeping the same shall be found, shall be required to give to the commissioner or justice of the peace respectively before whom the said stores or goods shall and may be brought, an account, to the satisfaction of such commissioner or justice, that the same were not embezzled or stolen from any of his Majesty's ships or vessels, yards, storehouses, or other places, or that if the same were embezzled or stolen, the same had come to the possession of the said party or parties honestly, and without any knowledge or suspicion that the same had been embezzled or stolen; on failure whereof by a reasonable time, to be set by such commissioner or justice of the peace, the said stores or goods shall thereupon become forfeited, and such party or parties shall be deemed and adjudged guilty of a misdemeanor."

The twelfth section authorizes persons deputed by the principal officers, or commissioners of the navy, &c. to search and detain

(g) As to this part of the punishment, see now 56 Geo. 3. c. 138.

(h) And see also as to the authority of the treasurer, &c. or any commis-

sioner of the navy for the time being, to act as a justice of the peace, 9 Geo. 3. c. 30. s. 5.

any barge, boat, or other craft, reasonably suspected to contain any stores, &c. embezzled, or unlawfully procured; and apprehend the persons reasonably suspected of having, or conveying them in such barge, &c. and convey them, together with the stores, &c. before a commissioner or justice of peace, who are to commit, bind over, or otherwise deal with such persons according to law, in respect of the *marked* stores, &c.; and in respect of the stores, &c. *not marked*, but nevertheless reasonably suspected to be the property of his Majesty, the persons on whom they are found are to be required to give an account, to the satisfaction of the commissioner or justice, that they were not embezzled, or if embezzled had come to their possession honestly, and without knowledge or suspicion, that they had been embezzled; on failure whereof by a reasonable time to be set, as thereinbefore mentioned, such stores, &c. are to become forfeited, and the person apprehended to be adjudged guilty of a misdemeanor, and the barge, boat, &c. are to be forfeited. The following section of the act gives power to persons so deputed, and also to any peace officer, to apprehend persons having any stores, &c. though not in any barge, boat, or other craft, and authorizes similar proceedings in such cases.

The act then provides for the disposal of stores, &c. and any barge, boat, &c. which have become forfeited.

The sixteenth section enacts, that every person adjudged guilty of any of the aforesaid misdemeanors, before any commissioner, or justice of peace, shall, for every such misdemeanor, forfeit for the first offence the sum of forty shillings; for the second offence the sum of five pounds; and for the third and every subsequent offence, the sum of ten pounds over and above the other forfeitures thereinbefore mentioned. And it further provides for the levying and disposal of the forfeitures.

By the seventeenth section, every adjudication in any of the said misdemeanors is to be certified by the commissioner or justice making it to the next general or quarter sessions of the peace, to be filed and entered amongst the records of the session: and such conviction is not to be set aside or quashed for want of form, nor be removed by *certiorari*, advocacy, or suspension into any other court; but shall be deemed to be final to all intents and purposes whatsoever.

Powers are then given to the commissioners of the navy, ordnance, and victualling, and to justices of peace out of sessions, to hear and determine offences in a summary way, in cases where the stores found are of a value not exceeding twenty shillings, and punish the offender by fine, &c. And an appeal is given to the quarter sessions from such convictions.

The twenty-fourth section enacts, "that nothing hereinbefore contained, which gives to any commissioner or justice of the peace, power and authority to hear and determine offences in a summary way, shall extend or be deemed construed or taken to extend, to prevent the party or parties accused of selling or delivering, or of having in his, her, or their custody, possession, or keeping, or of receiving or concealing any of the stores, marked as above mentioned, under the value of twenty shil-

sons conveying stores in them may be detained, &c. and if the stores be *marked* are to be committed, &c.; and if *not marked* the persons are to give a satisfactory account, or the stores are to become forfeited, and the persons deemed guilty of misdemeanor.

Apprehension of persons having stores, &c. though not in a barge, &c.

S. 14, 15. Disposal of forfeited stores, &c.

S. 16. Punishment of misdemeanors.

S. 17. Conviction to be certified to the quarter sessions.

S. 18, 19, 20, 21, 22, 23. Summary jurisdiction where stores, &c. under twenty shillings.

S. 24. Nothing contained in the act as to summary jurisdiction is to prevent the parties accused from being prosecuted as receivers of stolen goods.

"lings, from being prosecuted as receivers of stolen goods under this act, or for unlawfully having the same in his, her, or their custody, or concealing the same under the said recited acts of the 9 & 10 W. 3., 9 Geo. 1., or 17 Geo. 2., in any court of record, oyer and terminer, or otherwise, as they might have been if no such power or authority had been given; or to take away from any person or Court whatsoever any power, right, jurisdiction, pre-eminence or authority, which he or they or any of them ought lawfully to have had and enjoyed for the hearing and determining of such offences, in case no such power or authority to hear and determine the same in a summary way had been given; so as that the same person shall not be punished twice for the same offence."

S. 25, 26. Commissioners of the navy, &c. may sell marked stores, and the buyer be protected by a certificate.

It is then enacted, that the commissioners of the navy, ordnance, or victualling, may sell and dispose of marked stores, as before the making of the act; and that persons buying them of the commissioners may keep them without incurring any penalty, upon producing a certificate under the hand and seal of three or more of the commissioners, that they bought the stores from them, or a certificate from such persons as shall appear to have bought the stores from the commissioners, that such stores were stores or part of stores bought of the commissioners. In these certificates the quantities of the stores are to be expressed, and the time when and where bought of the commissioners: and the commissioners, or any three of them, and also the persons afterwards selling the stores are directed, from time to time, to give such certificates to the buyers desiring the same, within thirty days after the sale and delivery. And provision is made for the punishment, by forfeiture of 200*l.*, &c. of persons giving or publishing any false certificate.

Penalty for false certificate.

S. 27, 28. Protection of persons executing the statute.

S. 29. *et sequ.* Statute to extend to Scotland.

52 Geo. 3. c. 12. extends the former statutes to Ireland.

54 Geo. 3. c. 60. extends the 9 & 10 W. 3. c. 41. and 39 & 40 Geo. 3. c. 89., to cordage worked with *worsted* threads.

Several enactments are then made for the protection of persons making seizures, and otherwise acting in execution of the statute.

By the twenty-ninth section, the statute is to extend to *Scotland*; and several subsequent sections direct the course of proceedings in that country.

The statute 52 Geo. 3. c. 12. recites the statute 22 Car. 2. c. 5., (i) and also the statutes 9 & 10 Wm. 3. c. 41., 9 Geo. 1. c. 8., 17 Geo. 2. c. 40., and 39 & 40 Geo. 3. c. 89.; and enacts, that all those acts, so far as they severally relate to his Majesty's naval ordnance and victualling stores, therein respectively mentioned, shall extend to *Ireland*; but provides that no summary proceedings shall be had there before a justice of the peace, without the consent in writing of the naval store-keeper for the time being, at any port in *Ireland*.

The statute 54 Geo. 3. c. 60. extends the provisions of the 9 & 10 W. 3. c. 41., and 39 & 40 Geo. 3. c. 89., in respect to the making, selling, delivering, receiving, having in possession, and concealing, cordage wrought either with a white thread laid the contrary way, or with a twine laid to the contrary way, mentioned in those acts, to cordage wrought with one or more *worsted* threads.

The statute 55 Geo. 3. c. 127. repeals a former act, 53 Geo. 3. c. 126. It also recites the statutes 9 & 10 W. 3. c. 41., 9 Geo. 1. c. 8., 17 Geo. 2. c. 40., and 39 & 40 Geo. 3. c. 89., and enacts that those statutes, "so far as the same severally relate to his Majesty's naval, ordnance and victualling stores therein respectively mentioned, and all the pains, penalties, forfeitures, regulations, restrictions, powers, provisions, clauses, matters and things therein respectively contained, relating to his Majesty's naval, ordnance and victualling stores therein respectively mentioned, shall extend and be construed to extend to all public stores whatsoever under the care, superintendence, or controul of any officer or person in the service of his Majesty, his heirs or successors, or employed in any public department or office, either marked with the marks or any of them in the said recited acts or any of them specified, or with the broad arrow, and the letters B. O., or with a crown and the broad arrow, or with his Majesty's arms, or with the letters G. R., to denote the property of his Majesty his heirs or successors therein, and to all and every person and persons, not authorized by the proper officer or officers, person or persons in his Majesty's service, in that behalf so to do, using any such marks, or making any goods marked with such marks, or any of them, and to all and every person and persons in whose custody, possession, or keeping any such public stores so marked as aforesaid shall be found, or who shall willingly or knowingly receive or have in his, her, or their custody, possession, or keeping, or who shall conceal any such public stores so marked as aforesaid, unless such person or persons shall upon his, her, or their trial, produce a certificate or certificates under the hand or hands of the proper officer or officers, person or persons in his Majesty's service authorized to grant the same, of such and the like nature as the certificate in the said recited acts of the 9 & 10 W. 3., and 39 & 40 Geo. 3. mentioned; and to all and every person and persons who shall wilfully and fraudulently destroy, beat out, take out, cut out, deface, obliterate or erase wholly or in part, any of the said marks, or cause, procure, employ, or direct any other person or persons so to do, for the purpose of concealing the property of his Majesty his heirs or successors therein, as fully and effectually, to all intents and purposes, as if all the same several pains, penalties, forfeitures, regulations, restrictions, powers, provisions, clauses, matters, and things, in the said several acts contained, so far as the same severally relate to his Majesty's naval, ordnance, and victualling stores, and the punishment of persons offending in manner therein mentioned were herein and hereby severally repeated and re-enacted in respect to all other public stores whatsoever."

55 Geo. 3. c. 127. recites the 9 & 10 W. 3. c. 41., the 9 Geo. 1. c. 8., the 17 Geo. 2. c. 40., and the 39 & 40 Geo. 3. c. 89., and extends those acts to all public stores.

Upon the construction of these statutes it should be observed that the king's mark denotes the original ownership, and that the *onus probandi* is thrown upon the party having public stores in his possession, to account satisfactorily for that possession according to the regulations prescribed. But though the bare fact of possession ordinarily concludes the party, it is open to explanation;

Construction of these statutes. *Onus probandi* upon the party having stores in his possession.

and the presumption arising from it may be rebutted by circumstances. (o)

But the fact of possession is open to explanation; and the presumption arising from it may be rebutted by circumstances.

This principle was acted upon by Mr. Justice Foster, in a case where a widow woman was indicted on the statute 9 & 10 W. 3. c. 41. for having in her custody divers pieces of canvass marked with his Majesty's mark in the manner described in the act, she not being a person employed by the commissioners of the navy to make the same for his Majesty's use. The canvass was produced at the trial marked as charged in the indictment, and was proved to the satisfaction of the court and jury to be of that sort which is commonly made for the use of the navy; and to have been found in the defendant's custody. The defendant did not attempt to shew that she was within the exception of the act, as being a person employed to make canvass for the use of the navy; nor did she offer to produce any certificate from any officer of the crown touching the occasion and reason of such canvass coming into her possession. Her defence was that when there happened to be in his Majesty's stores a considerable quantity of old sails, no longer fit for that use, it had been customary for the persons, intrusted with the stores, to make a public sale of them in lots, larger or smaller, as best suited the purpose of the buyers; and that the canvass produced in evidence, which happened to have been made up long since, some for table linen and some for sheeting, had been in common use in the defendant's family a considerable time before her husband's death, and upon his death came to the defendant; and had been used in the same public manner by her to the time of the prosecution. This was proved by some of the family, and by the woman who had frequently washed the linen. This sort of evidence was strongly opposed by the counsel for the crown, who insisted that, as the act allows of but one excuse, the defendant, unless she can avail herself of that, cannot resort to any other: and they asked why, if the canvass was really bought of the commissioners, or of persons acting under them (which is the only excuse pointed out by the statute), no certificate of that matter was taken at the time of the purchase, since the fourth section of the act admits of that excuse, and the second section admits of no other? But Foster, J., was of opinion that though the clause of the statute, which directs the sale of these things, had not pointed out any other way for indemnifying the buyer than the certificate; and though the second section seemed to exclude any other excuse for those in whose custody they should be found; yet still, the circumstances attending every case, which might seem to fall within the act, ought to be taken into consideration; otherwise a law calculated for wise purposes might, by too rigid a construction of it, be made a hand-maid to oppression. He observed that there was no room to say that this canvass came into the possession of the defendant by any act of her own; that it was brought into family use in the lifetime of her husband, and it continued so to the time of his death; and by act of law it came to her. That things of this kind had been frequently exposed to public sale; and though the

act pointed out an expedient for the indemnity of the buyers; yet, probably, few buyers, especially where small quantities had been purchased in one sale, had used the caution suggested to them by the act. And that if the defendant's husband really bought this linen at a public sale, but neglected to take a certificate, or did not preserve it, it would be contrary to natural justice, after such a length of time, to punish her for this neglect. He, therefore, thought the evidence given by the defendant proper to be left to the jury; and directed them that if, upon the whole of the evidence they were of opinion, that the defendant came to the possession of the linen without any fraud or misbehaviour on her part, they should acquit her; and she was acquitted. (p)

In a subsequent case of an information upon the statutes 9 & 10 W. 3. c. 41. and 17 Geo. 2. c. 40. s. 10. it was contended by the counsel for the prosecution that the only mode by which the defendant, against whom a possession of the stores was proved, could discharge himself, was by producing the Navy Board certificate granted at the time of the sale, as that was the only evidence of the legal possession of them. But Lord Kenyon, C. J., said that though it was clear that in prosecutions under the statutes in question it was sufficient for the crown to prove the finding of the stores, with the king's mark, in the defendant's possession, to call upon him to account for that possession, and the manner of his coming by them; so as to throw the *onus* upon the defendant of proving that he had legally become possessed of them; yet, that it could not bear a question, but that the defendant had other means of shewing that he had lawfully become possessed of them than by the production of the certificate from the Navy Board: as, for example, he might shew that he had bought them from another person who was in the practice of buying stores at the navy sale; and who, therefore, might fairly be presumed to have had the regular certificate, but who, when he sold part to the defendant, could not, consistently with his own safety, part with the certificate, he had obtained, of his having been the purchaser of the whole lot. (q) And his lordship, after alluding to the case in which this doctrine had been holden by Mr. Justice Foster (whom he spoke of as one of the best crown lawyers that had ever sat in Westminster-hall), said that if the defendant could shew either a navy certificate, or prove the purchase of the stores mentioned in the information from any person who might be presumed to have been possessed of the proper certificate, from the circumstance of such person having frequently been a purchaser at such sales, he was of opinion that it was such evidence as ought to induce the jury to find the defendant not guilty. And the defendant, accordingly, gave such evidence, and was acquitted. (r)

Where an indictment charged that one T. Cole, on the 28th of January, 1801, unlawfully, willingly, and knowingly did receive

Banks's case.
A defendant, against whom the possession of stores is proved, may discharge himself by other evidence than that of a navy board certificate.

Cole's case.
A distinction taken (upon

(p) *Anon. cor. Foster, J., on the Western circuit, Fost. 439.*

(q) At this time, by the statute 39 & 40 Geo. 3. c. 89. s. 25. a buyer is protected by producing a certificate

from such person as shall appear to have bought the stores from the commissioners, *ante*, 272.

(r) *Rex v. Banks, cor. Lord Kenyon, C. J., 1794. 1 Esp. R. 145.*

the particular circumstances of the case) between a receiving and having in possession.

and have in his custody, possession and keeping, certain naval stores of the king, being all marked with the broad arrow, he not being a contractor, &c., against the statute; with a second count, charging him with concealing naval stores, &c.; and the jury found the prisoner guilty on the first count, but acquitted him on the second, and said that they did not find that he *received* the stores after the 28th of July, 1800, but only that he had them in his possession after that day; the judgment was respited in order to take the opinion of the Judges upon the point. A majority of the Judges were inclined to think that the statute was to be construed in the disjunctive, and the word *or* (receive *or* have) not to be taken as *and*: but, because of the disagreement of some, and that the case was not likely to occur again, the prisoner, on the finding of the jury, was recommended to mercy. (s)

It appears to have been agreed that the foregoing case was not within the statute 9 & 10 W. 3. c. 41. because the goods were not charged to have been found in the prisoner's possession. (t)

The forfeiture under 9 & 10 W. 3. c. 41. s. 2. accrues by conviction on an indictment.

In a case upon the statute 9 & 10 W. 3. c. 41. s. 2. an exception was taken to the indictment, in arrest of judgment, that no indictment lay because it was a new offence, and a particular penalty inflicted of forfeiture of the goods and 200*l.*: but the exception was over-ruled because the forfeiture accrues by the conviction on an indictment for the offence. (u)

Counts upon sections 1 and 2 of the 39 & 40 Geo. 3. c. 89. may be joined in the same indictment.

Though the having in possession new stores, or stores not more than one-third worn, is subject to transportation for fourteen years, by the 39 & 40 Geo. 3. c. 89. s. 1., and the having in possession stores not new, or more than one-third worn, is, by the second section of that statute, subjected to a different punishment, yet counts for both these offences may be included in the same indictment. (x) It is said to have been agreed that, although an indictment state that the prisoner, "then or at any time before" "not being a contractor with or authorized by the principal officers or commissioners of our said lord the king, of the navy, ordnance, &c. for the use of our said lord the king, to make any stores of war, &c.;" yet, that it is not incumbent on the prosecutors to prove this negative averment, but that the defendant must shew, if the truth be so, that he is within the exception in the statute. (y)

Proof of negative averment of the prisoner not being a contractor, &c.

As to the informer being a witness.

It appears to have been holden in one case, that the informer was an interested witness, as being entitled to a moiety of the fine of 200*l.*, on a prosecution on the statutes 17 Geo. 2. c. 40. s. 10. and 9 & 10 W. 3. c. 41., though it was urged that it was in the discretion of the Judge to inflict a corporal punishment in lieu of the fine; and the witness was rejected. (z) But, in a subsequent case, Lord Kenyon, C. J., said, that he had considered the objection to the competency of the informer's being a witness on the

(s) Cole's case, 1801, MS. and 2 East. P. C. c. 16. s. 153. p. 767. The date of the stat. 39 & 40 Geo. 3. c. 89. is the 28th July, 1800.

(t) *Id. ibid.*

(u) Reg. v. Harman (3 Anne.) 2 Ld. Raym. 1104.

(x) By Lord Ellenborough, C. J., in Rex v. Johnson, 3 M. & S. 550.

(y) Willis's case, 1791, 1 Hawk. P. C. c. 89. s. 17.

(z) Rex v. Blackman, cor. Kenyon, C. J., 1791, 1 Esp. R. 93.

ground of interest; and that, as the statute had given the Court a power, at their discretion, either to inflict a corporal punishment, or to impose a fine in case of conviction, and as it was only in case a fine was imposed that the witness could expect to derive any benefit, (an uncertainty depending upon the judgment of the Court,) he was then of opinion that the objection went to the credit, not to the competency, of the witness; and that, therefore, his evidence was admissible. (a)

It appears to have been holden that, where a peace officer, in searching for other goods, discovered naval stores, and in consequence of such discovery by him an information was filed against the offender, such peace officer was to be deemed the informer. (b) But, where a witness stated that though no information respecting the stores in question had been given to the admiralty until the time of the seizure, yet that he made the seizure in consequence of information given to him, by another person, of the stores being in the defendant's possession, it was ruled that the witness was not to be considered as the informer; and that the informer was the person upon whose information the seizure had been made, not he who had made the seizure in consequence of such information. (c)

With respect to the power of the Court to inflict corporal punishment, under the authority of the statutes 9 & 10 W. 3. c. 41. s. 2., 9 Geo. 1. c. 8. s. 4., and 17 Geo. 2. c. 40. s. 10., it was contended, in a case where the defendant had been committed on an indictment charging him in one count with concealing naval stores, and in another with having them in his custody, that no such power existed under either of those statutes, where the defendant was ready and offered to pay the penalty of 200*l.*; but the Court of King's Bench said it was impossible to raise any serious doubt upon the point, for that the words of the statutes were in the disjunctive, enabling them either to impose a penalty, or to punish the offender corporally. (d) In another case, where the defendant was brought up for judgment for a similar offence, it was moved on the part of the prosecution, that he should be adjudged to pay the whole penalty of 200*l.* and the costs; and submitted that the Court had the power of awarding costs under the words of the 9 & 10 W. 3. c. 41. s. 2. And the Court adjudged the defendant to pay the penalty of 200*l.* together with the costs, which were taxed at 12*l.* (e)

But the statute 39 & 40 Geo. 3. c. 89., took away the power of the Court to sentence to *hard labour*. A defendant was brought up for judgment, after conviction, on the stat. 9 & 10 W. 3. c. 41. s. 2., for unlawfully having in his possession the king's naval stores, marked with the king's mark; and judgment was about to be pronounced that he should be imprisoned in the house of correction for the county of Surry, and there kept to *hard labour*

As to the person considered as an informer.

Corporal punishment may be inflicted under the statutes 9 & 10 W. 3. c. 41. s. 2., 9 Geo. 1. c. 8. s. 4., and 17 Geo. 2. c. 40. s. 10.

And costs may be awarded under 9 & 10 W. 3. c. 41. s. 2.

But the statute 39 & 40 Geo. 3. c. 89. took away the power of the Court to sentence to *hard labour*.

(a) *Rex v. Cole*, *cor.* Lord Kenyon, C. J., 1794. 1 Esp. 169.

(b) *Rex v. Blackman*, 1 Esp. R. 95.

(c) *Rex v. Banks*, 1 Esp. R. 145.

(d) *Rex v. Bland*, 5 T. R. 370. 2 Leach 595. 2 East. P. C. c. 16. s. 148.

p. 760. And the later statute, 39 & 40 Geo. 3. c. 89. s. 1., expressly enacts as to corporal punishment. *Ante*, 268.

(e) *Chapple's case*, 5 T. R. 371. note (a).

for three calendar months, and be once during that time publicly whipped. This would have been warranted by the statute 17 Geo. 2. c. 40. s. 10., reciting the statutes 9 & 10 W. 3. c. 41. and 9 Geo. 1. c. 8.; but a doubt occurring how far the power of sentencing to hard labour was taken away by the subsequent statute of the 39 & 40 Geo. 3. c. 89. s. 2. the Court, upon further consideration, and comparing the different provisions of these statutes, were of opinion that the power of sentencing to hard labour was taken away by the latter statute, and therefore pronounced judgment that the defendant should be imprisoned in the house of correction for the county of Surry, for three calendar months, and be once during that time publicly whipped. (f)

(f) *Rex v. Bridges*, K. B. 1806, 8 East. 53.

CHAPTER THE THIRTIETH.

OF UNLAWFULLY RECEIVING TACKLE OR GOODS CUT FROM OR LEFT BY SHIPS; AND OF RECEIVING GOODS STOLEN ON THE RIVER THAMES.

THE statute 1 & 2 Geo. 4. c. 75. s. 1. enacts, "that all pilots, boat-men, hovellers, or other persons who shall take up any anchors, cables, tackle, apparel, furniture, stores, or materials, or any goods or merchandize which may have been parted with, cut from or left by any ship or vessel within any harbours, rivers, or bays, or on any of the coasts of this kingdom, whether the same ship or vessel shall be or shall have been in distress or otherwise, and which shall have been weighed, swept for or taken possession of by any such boatman, pilot, hoveller, or other person," shall send a report in writing of the articles so found, and stating the marks, if any, thereon, and also an accurate and particular description of the bearings, distances, and situations, and the time when and where the same were so found, to a deputy vice-admiral or his agent, at or near to the port or place where such boatmen, &c. shall first arrive with such articles, within forty-eight hours after their arrival at such port, &c. or before they shall leave the port, if they shall quit it before that time shall expire; and shall also, within the same period, deliver such articles so found into a proper warehouse, or such other place as the vice-admiral of each county shall appoint for safe custody, until the same shall be claimed by the owner thereof, or his agent, and the salvage, together with such other charges and expences as are thereafter directed to be paid in respect of such articles, paid by him or them, or security given for the payment thereof, to the satisfaction of the salvor, and that "every such pilot, boatman, hoveller, or other person, who shall wilfully and fraudulently keep possession of, or retain or conceal, or secrete any anchors or cables, tackle, apparel, furniture, stores, or materials, or any goods or merchandize, or deface, take out, or obliterate the marks and numbers thereon, or alter the same in any manner, with intent thereby directly or indirectly to prevent the discovery and identification of such articles so

1 & 2 Geo. 4. c. 75. s. 1. Pilots, &c. taking up anchors, cables, &c. or goods, &c. cut from or left by ships, are to make a report to the deputy vice-admiral, and to deliver the articles, &c.

And pilots, &c. fraudulently retaining, &c. any such articles, or defacing marks, and not reporting and delivering &c. to be deemed guilty

of receiving goods knowing them to have been stolen.

“ found, weighed, swept for, or taken possession of as aforesaid, and shall not report and deliver the same at some proper warehouse or other place in manner aforesaid, and within the time herein-before limited, shall forfeit all claim to salvage, and shall, on conviction, be adjudged and deemed guilty of receiving goods knowing them to have been stolen, and shall suffer the like punishment as if the same had been stolen on shore.”

S. 12. Persons knowingly, &c. purchasing or receiving any anchors, cables, &c. or goods taken up, &c. if the directions have not been complied with, are to be deemed guilty of receiving stolen goods, knowing, &c.

The twelfth section enacts, “ that if any person shall knowingly and wilfully, and with intent to defraud and injure the true owner or owners thereof, or any person interested therein as aforesaid, purchase or receive any anchors, cables, or goods or merchandize which may have been taken up, weighed, swept for, or taken possession of, whether the same shall have belonged to any ship or vessel in distress or otherwise, or whether the same shall have been preserved from any wreck, if the directions hereinbefore contained with regard to such articles shall not have been previously complied with, such person or persons shall, on conviction thereof, be deemed guilty of receiving stolen goods, knowing the same to be stolen, as if the same had been stolen on shore, and suffer the like punishment as for a misdemeanor at the common law, or be liable to be transported for seven years, at the discretion of the Court before which he she or they shall be tried.”

S. 13. requires masters, &c. of ships going out to sea, finding or receiving anchors, cables, &c. to take certain steps for communicating, &c.

The statute then requires, that in case any master, &c. of any ship bound to parts beyond the seas, shall find and take on board any anchor, &c. or any goods, &c. or shall receive such articles on board from any other person who may have found the same, knowing the same to have been so found, the master, or other person having the command of the ship, shall make a true entry in the log-book of the description of the articles, stating the marks, and the bearings, time, &c. when taken on board, and shall transmit a report on the first opportunity to the Trinity House, and on the return of the ship shall deliver up the articles into the possession of a deputy vice-admiral, or his agent, within twenty-four hours, with a similar report; and for default imposes a pecuniary penalty not exceeding 100*l.* (a)

S. 15. makes the conveying anchors and cables obtained by weighing, sweeping for, &c. to any foreign port, &c. and there selling, &c. felony, punishable by transportation.

The fifteenth section contains the following enactment: “ where-as as pilots, hovellers, boatmen, and other persons in small vessels, have for many years conveyed anchors and cables which may have been weighed, swept for, or taken possession of by them as aforesaid, or which they may have purchased of other persons, knowing them to have been weighed, swept for, or taken possession of, without being reported as aforesaid, to foreign countries, and there sold and disposed of, to the manifest injury and loss of the owners thereof; for remedy whereof be it further enacted, that every pilot, hoveller, boatman, or the master of any such vessel, who shall convey any such anchor or cable to any foreign port, harbour, creek, or bay, and there sell and dispose of the same, shall be deemed and adjudged guilty of

(a) S. 13.

"felony, and shall be transported for any term not exceeding "seven years."

This act requires dealers in marine stores to have their names, with the words, "Dealer in marine stores," painted upon the front of the places where their goods are deposited; (b) and contains many other regulations for preventing depredations on ship-owners, &c. and for the adjustment of salvage, some of which are enforced by pecuniary penalties, recoverable by proceedings of a summary nature.

Depredations upon ship-owners, &c.

By section twenty-two, all felonies, misdemeanors, and other offences under the act shall be laid to be committed, and shall be tried in any city or county, (being a county,) where any article, &c. in relation to which the offence shall have been committed, shall have been found in the possession of the person committing the offence; or if the same shall have been sold in foreign parts, then in the county or place in which the person selling the same shall reside. (c)

S. 22. Trial of offences where articles found; or where offenders reside, if articles found in foreign parts.

The statute 2 Geo. 3. c. 28. intituled "An act to prevent the committing of thefts and frauds, by persons navigating bum-boats and other boats; upon the river *Thames*," contains various provisions and enactments, by which persons unlawfully receiving, or having possession of ropes, materials, &c. or any part of the cargo of any vessel in that river, may be prosecuted by summary proceedings before justices, and convicted of misdemeanors. The twelfth section relates to more important proceedings; and enacts, "that every person who shall buy or receive any part of the cargo, or loading of, or any goods, stores, or things, of or belonging to any ship or vessel in the said river, knowing the same to be stolen or unlawfully come by: or shall privately buy or receive any such goods, stores, or things, or any part of such cargo or loading, by suffering any door, window, or shutter to be left open or unfastened between sun-setting and sun-rising for that purpose, or shall buy or receive the same, or any of them, at any time, in any clandestine manner, from any person or persons whomsoever, shall, being thereof convicted by due course of law, (although the principal felon or felons, offender or offenders, has or have not been convicted of stealing or unlawfully procuring the same) be transported for fourteen years, to any of his Majesty's colonies or plantations in *America*, according to the laws in force for the transportation of felons."

2 Geo. 3. c. 28. provides for the prevention of thefts, &c. on the *Thames*;

And by s. 12. enacts, that receivers of any cargo, goods, &c. stolen from any vessel in that river, shall be transported for fourteen years.

By the eighteenth section of this act, any person without a warrant may apprehend offenders committing any of the of-

S. 18, 19, apprehension of offenders; and

(b) S. 16.

(c) By s. 23. the act is not to extend within the limits of the *Cinque Ports*, specified in the 48 Geo. 3. c. 130: nor to the 48 Geo. 3. c. 104, which is an act for the regulation of pilots. S. 24. contains a proviso for the jurisdiction, &c. of the High Court of Admiralty, &c.; s. 25. a proviso for the right of the crown, and

of lords of manors; s. 34. for the right of the Trinity-houses of *Kings-ton-upon-Hull*, *Newcastle-upon-Tyne*, and *Scarborough*; and, s. 35., for the rights of the city of *London*. By s. 36. the act is not to extend to *Scotland* or *Ireland*.—As to offences within the jurisdiction of the *Cinque Ports*, see now 1 & 2 Geo. 4. c. 76.

punishment of persons obstructing the execution of the act.

39 & 40 Geo. 3. c. 87. made further provisions for preventing such depredations.

And enacted that persons indicted under the 2 Geo. 3. c. 28. should not have time to traverse the indictment as in cases of misdemeanor.

But it appears to have been holden in K. B. that a receiving of such stolen goods is a felony.

fences thereinbefore mentioned, and deliver them to a constable, &c. And by the nineteenth section, persons obstructing those who are acting in the execution of any of the powers granted by the act shall, on conviction at the quarter sessions, upon the oath of two or more credible persons, be transported for seven years.

The statute 39 & 40 Geo. 3. c. 87. made further provisions for the more effectual prevention of depredations on this river and its vicinity, creating other misdemeanors, and providing for the punishment of offenders, by proceedings before justices of the peace. It also recited, that by the former act, 2 Geo. 3. c. 28., persons guilty of certain offences were punishable by transportation for fourteen years; but, the said offences not being by the said act declared to be felony, the trial thereof might in all cases be put off, by means of a traverse, to the next sessions after the finding of the bill of indictment for the same, and the offender be in the mean time liberated, on being admitted to bail, whereby justice had been in many instances eluded: and then enacted, "that whenever any indictment shall be found against any person "or persons for the said offences, or any of them, the person or "persons so indicted shall plead to the same indictment, without "having time to traverse the same, as is usual in cases of misdemeanor." (d)

From this section of the statute, it appears to have been the opinion of the legislature, that the offence of receiving, under the former act, 2 Geo. 3. c. 28. s. 12., was only a misdemeanor. But a different construction was put upon the former statute, by the Court of King's Bench, in a case where a motion was made to bail a defendant, committed for receiving part of a cargo, belonging to a vessel in the *Thames*, knowing it to have been stolen. The motion was opposed on the ground that the offence was a felony. And it was argued that by the statute 3 & 4 W. & M. c. 9. s. 4. (now repealed) receivers of stolen goods might be prosecuted as felons; and by 1 Anne, st. 2. c. 9. s. 2. (also now repealed) might be punished as for a misdemeanor, where the principal felon was not convicted; that the statute under which the prisoner stood committed, must be considered as *in pari materia*; and that although the twelfth section of it did not, in express words, declare that such offenders should be *felons*, yet it was evident they were intended by the legislature to be so considered; for by the fourteenth section it was enacted, that any person stealing, or unlawfully receiving stolen goods, knowing the same to be stolen, should, on discovering two other offenders, be entitled to a pardon for all *such felonies*. (e) And upon this point it is observed, that the statute seems only to have made the receiving of the goods under such circumstances evidence of their having been received by the party, knowing them to have been stolen. (f) But the words of the statute appear to be very ge-

(d) This act was continued till the 25th March, 1814, by 47 Geo. 3. sess. 1. c. 37. s. 1.

(e) *Rex v. Wycr*, 1 Leach, 480. 2

T. R. 77. 2 East. P. C. c. 16. s. 145. p. 753.

(f) 2 East. P. C. c. 16. s. 145. p. 753.

neral in their expression, if in fact they were intended only to apply to the evidence of a receiving.

The late statute 3 Geo. 4. c. 55. has for one of its objects the more effectual prevention of depredations on the river *Thames* and its vicinity for seven years; and it contains various provisions by which certain offences are declared to be misdemeanors, and subjected to pecuniary penalties, with the addition in some instances of imprisonment. By sect. 41, offences of this kind are to be heard and determined by the justices therein mentioned: and by sect. 42. misdemeanors under the 2 Geo. 3. c. 28. are to be punished at the discretion of the justices as therein mentioned.

CHAPTER THE THIRTY-FIRST.

OF CHEATS, FRAUDS, FALSE TOKENS, AND FALSE PRETENCES.

WHERE the possession of goods is obtained, in the first instance, without fraud upon a contract or trust, a subsequent dishonest conversion of them, while the privity of contract continues undetermined, will in general be only a breach of trust or civil injury, and not the subject of a criminal prosecution. (a) But where the party obtaining the goods has recourse to fraudulent means in the first instance, and thereby succeeds to the extent of inducing the owner not only to deliver the possession of the goods to him but absolutely to *part with the property* in them, though such a taking will not, as we have seen, be considered as felonious and amounting to larceny; (b) yet if effected by means of a false pretence, it will come within the enactment of the 7 & 8 Geo. 4. c. 29. s. 53., and be punishable as a misdemeanor. And that statute, reciting the frequent failure of justice from the subtle distinction between larceny and fraud, provides, that if upon the trial of any person indicted for such misdemeanor, it shall be proved that he obtained the property in question in any such manner as to amount in law to larceny, he shall not, by reason thereof, be entitled to be acquitted of such misdemeanor. There are also other statutes which relate to particular cheats and frauds therein specified. And besides the offences of this kind punishable by statute, the common law also provides for the punishment of many of such cheats and frauds as may affect the public welfare. It was decided that, in order to constitute a cheat properly so called, there must be a prejudice received, both at common law and under the statutes (now repealed) of 33 Hen. 8. c. 1. and 30 Geo. 2. c. 24. (c)

In treating of these offences we may consider; I. Of cheats and frauds punishable at common law. II. Of cheats and frauds by means of false pretences, within the statute 7 & 8 Geo. 4. c. 29. s. 53.: and, III. Of some of the cheats and frauds punishable by other statutes.

(a) 3 Inst. 107. 2 East. P. C. c. 16. s. 113. p. 693. *Ibid.* c. 18. s. 1. p. 816. *Ante*, 131.

(b) *Ante*, 109, *et sequ.* And see the opinion of Eyre, B., on the debate in

Pear's case, 2 East. P. C. c. 16. s. 112. p. 689, note (a).

(c) Ward's case. 13 Geo. 1. 2 Lord Raym. 1461. 2 Str. 747. 2 East. P. C. c. 19. s. 7. p. 860, 861.

SECTION I.

Of Cheats and Frauds Punishable at Common Law.

Those cheats which are levelled against the public justice of the kingdom are indictable at common law. (d) Judicial acts done without authority, in the name of another, are cheats of this description; but as they are generally attended by a *false personating* of some one, they will come under consideration in a subsequent chapter. (e) It may briefly be mentioned in this place, that with respect to a precedent of an indictment against a married woman, for pretending to be a widow, and as such executing a bail bond to the sheriff for one arrested on a bailable writ, it is observed, that perhaps this was considered as a fraud upon a public officer, in the course of justice. (f) And another case should be noticed, where, upon an application to the Court of King's Bench to discharge a defendant who had been holden to bail under a Judge's order, made upon an affidavit of debt sworn before a magistrate at *Paris*, the court desired that the counsel would speak upon the point, how far the making, or knowingly using such an affidavit, if false, was punishable. (g) And after argument, Lord Ellenborough, C. J. said, that he had not the least doubt, that any person making use of a false instrument, in order to pervert the course of justice, was guilty of an offence punishable by indictment. (h) In a former case it had been holden, that a person who, being committed to gaol under an attachment for a contempt in a civil cause, counterfeited a pretended discharge, as from his creditor, to the sheriff and gaoler, under which he obtained his discharge from gaol, was guilty of a cheat and misdemeanor at common law, in thus effecting an interruption to public justice; although, the attachment not being for non-payment of money, the order was in itself a mere nullity, and no warrant to the sheriff for the discharge. (i)

Cheats against public justice.

Those frauds which affect the crown and the public at large are also clearly the subject of indictment, though they may arise

Frauds affecting the crown and public.

(d) 2 East. P. C. c. 18. s. 4. p. 821.

(e) *Post. Chap. Of Falsely Personating, &c.*

(f) 2 East. P. C. c. 18. s. 4. p. 821. citing *Rex v. Blackburn*, M. 36 Car. 2. Trem. P. C. 101. Cro. Circ. Comp. 78.

(g) The authorities referred to for the purpose of shewing that it was punishable were 2 Hawk. P. C. c. 22. s. 1. 38, and 39., (which cites *Waterer v. Freeman*, Hob. 205, 266.) *Worsley v. Harrison*, Dy. 249, a. pl. 84. *Rex v. Mawby*, 6 T. R. 619, 635. *Rex v.*

Cropley, 7 T. R. 315, and 2 East. P. C. 821, which cites the authorities mentioned, *ante*, note (f).

(h) *Omealy v. Newell*, 8 East. 364. and his lordship said, that the case of the *King v. Mawby*, (*ante*, note (g).) went the whole length of the proposition.

(i) *Fawcett's case*, *York Spr. Ass.* 1793, and East. T. 1793. 2 East. P. C. c. 19. s. 7. p. 862. and s. 45. p. 952. See the case cited more at large, *Post. Chap. Of Forgery*, S. 2. upon the point of the offence being indictable as a forgery.

Selling un-
wholesome
provisions.

Treeve's case.
Supplying
prisoners of
war with un-
wholesome
food, not fit
to be eaten by
man, holden
to be an in-
dictable of-
fence.

Dixon's case.
Holden to be
an indictable
offence for a
baker to sell
bread contain-
ing alum in a
shape which

in the course of some particular transaction or contract with private individuals.

Amongst offences of this description, is the selling of *unwholesome provisions*. (k) And it is said, more largely, that the giving of any person unwholesome victuals, not fit for man to eat, *lucri causa*, or from malice and deceit, is undoubtedly, in itself, an indictable offence. (l)

A case is reported, where the indictment against the defendant was, that he knowingly, wilfully, deceitfully, and maliciously did provide, furnish, and deliver to and for eight hundred French prisoners of war, whose names were unknown, and there being under the protection of the king, confined in a certain hospital, called Eastwood hospital, in the parish and county, &c., divers large quantities, to wit, five hundred pounds weight of bread, to be eaten as food, by the said French prisoners of war, such bread being then and there made and baked in an unwholesome and insufficient manner, and then and there being made of, and containing dirt, filth, and other pernicious and unwholesome materials and ingredients, not fit to be eaten by man; and the said defendant then and there, well knowing the said bread to be baked in an unwholesome and insufficient manner, and to be made of, and to contain dirt, filth, and other pernicious and unwholesome materials, and ingredients, not fit to be eaten as aforesaid; whereby the said prisoners of war did then and there eat of the said bread, and thereby then and there became distempered in their bodies, and injured and endangered in their healths; to the great damage of the French prisoners, to the great discredit of our said lord the king, to the evil example, &c., and against the peace, &c. (m) And the defendant having been convicted, it was objected, in arrest of judgment, that the offence as laid was not indictable; as it did not appear that what was done was in breach of any contract with the public, or of any moral or civil duty; and the judgment was respited to take the opinion of the Judges upon the point; when they all held the conviction right. (n) In this case, the defendant was a contractor with government for the supplying of provisions to some of the French prisoners, then in this country: but the indictment did not state this fact; and it is observed, that it was not material to state it, otherwise than as matter of aggravation, if such a case wanted any; as there could be no doubt of the offence being in itself the subject of indictment upon the principles already mentioned. (o)

In a more recent case the indictment charged the defendant, a baker, with supplying to the Royal Military Asylum at Chelsea, as and for good wholesome household loaves, divers loaves mixed with certain noxious ingredients, not fit for the food of man, which he well knew so to be at the time he so supplied them. It appeared in evidence that many of the loaves delivered by the de-

(k) 4 Black. Com. 162.

(l) 2 East. P. C. c. 18. s. 4. p. 828.

(m) There were eight other counts in the indictment charging the offence to have been done at different

times, and in different prisons.

(n) Treeve's case, 1796. 2 East. P. C. c. 18. s. 4. p. 821.

(o) 2 East. P. C. c. 18. s. 4. p. 822.

defendant at the Military Asylum on a particular day were strongly impregnated with *alum*, and that there were found in them several pieces of *alum* in its crystalline form as large as horse-beans : the tendency of *alum* to injure the health was also proved ; and a statute 37 Geo. 3. c. 98. s. 21. referred to, by which the use of *alum* in the making of bread is prohibited under a penalty. On the part of the defendant it was proved that though he permitted *alum* to be used to assist the operation of the yeast, and to make the loaves look white, yet, that very great care was employed in the use of it ; that it was first dissolved, and then used in such small quantities, and so equally distributed, as not to be capable of occasioning injury ; and that if, on any particular occasion, the loaves delivered at this Asylum had *alum* put into them in a different manner, it was quite contrary to the directions and intentions, and wholly without the knowledge or privity of the defendant. And it was contended that these facts completely negatived the averment in the indictment, that the defendant, at the time these loaves were delivered, well knew that they were not wholesome, and that they were unfit for the food of man : and it was urged that the defendant could not be criminally responsible for the acts of his servants. But by Lord Ellenborough, C. J., "Whoever introduces a substance into bread, which may be injurious to the health of those who consume it, is indictable, if the substance be found in the bread in that injurious form, although, if equally spread over the mass, it would have done no harm. If a baker will introduce such a substance into his bread, he must do it at his own hazard, and he must take especial care that the benefit he proposes to himself, does not produce mischief to others. He is engaged in an illegal act, and he must abide the consequences. The statute 37 Geo. 3. c. 98. shews the judgment of the legislature with regard to *alum*, and a medical gentleman has given evidence as to its deleterious effects. If taken in very minute quantities it is innoxious. The same may be said of calomel, and even of arsenic. But would not a baker be answerable for selling bread having these substances mixed with it in a dangerous form, although he intended they should be so equally subdivided over the whole mass which he baked at one time that no harm could follow? If the defendant was cognizant of the manner in which his business was carried on, and knew that *alum* was at all used in the making of the loaves sent to the Military Asylum, which are proved to have contained it to a very dangerous degree, he is guilty of this indictment." And the defendant was accordingly convicted. (p) The point was afterwards brought under the consideration of the Court of King's Bench, who concurred in the direction of Lord Ellenborough given at the trial ; and Lord Ellenborough said, "He who deals in a perilous article must be wary how he deals ; otherwise, if he observe not proper caution, he will be responsible." (q)

renders it noxious, although he gave directions to his servants to mix it up in a manner which would have rendered it harmless.

(p) *Rex v. Dixon, cor. Lord Ellenborough, C. J., Guildhall, 1814, 4 Campb. 12.* See precedents for si-

milar offences, 2 Chit. Crim. L. 556, *et sequ.* 2 Stark. Crim. Plead. 656.

(q) *Rex v. Dixon, 3 M. & S. 11.*

Mala praxis of
a physician.

A case is reported where the Court of King's Bench held that the *mala praxis* of a physician is a great misdemeanor and offence at common law (whether it be for curiosity and experiment, or by neglect,) because it breaks the trust which the party has placed in the physician, and tends directly to his destruction. (r)

Rendering
false accounts
and other
frauds by per-
sons in official
situations.

In some cases the rendering false accounts and other frauds practised by persons in official situations, have been deemed offences so affecting the public as to be indictable. Thus, where two persons were indicted for enabling persons to pass their accounts with the pay office in such a way as to enable them to defraud the government; and it was objected that it was only a private matter of account, and not indictable; the Court held otherwise, as it related to the public revenue. (s) And instances appear in the books of indictments against overseers of the poor for refusing to account, (t) and for rendering false accounts. (u) And a precedent is given of an indictment against a surveyor of the highways for converting to his own use gravel which had been dug at the expence of the inhabitants of the parish, and also for employing for his own private gain and emolument the labourers and teams of the parishioners, which he ought to have employed in repairing the highways. (x) A case is also mentioned of an application to the Court of King's Bench for an information against the minister and churchwardens of a parish, who had spent the larger part of a sum of money, collected by a brief for certain sufferers by fire, at tavern entertainments, and then returned, upon the back of the brief, that the smaller sum only was collected; and the Court, though they refused the information, yet referred the prosecutors to the ordinary remedy by indictment. (y) A fraud committed by a parish officer, in procuring the marriage of a pauper, so as to throw the burden of maintaining such pauper on another parish, may also, as we have seen, be an indictable offence. (z) And several precedents are given of indictments for misdemeanors in procuring sick and impotent persons, standing in need of immediate relief, to be conveyed into parishes where they had no settlements, and in which they shortly afterwards

And some exceptions to the indictment, taken in arrest of judgment, were overruled; and the Court held that the indictment was sufficiently certain without shewing what the noxious materials were, or stating that the defendant intended to injure the children's health. Upon the last point Lord Ellenborough, C. J., said that it was an universal principle, that when a man is charged with doing an act, of which the probable consequence may be highly injurious, the intention is an inference of law resulting from doing the act; and that in this case it was alleged that the defendant delivered the loaves for the use and supply of the children, which could only mean for the children to

eat; for otherwise they would not be for their use and supply. And see *Rex v. Bower*, *post* 290, note (m).

(r) *Dr. Groenvelt's case*, 1697, 1 *Ld. Raym.* 213.

(s) *Rex v. Bembridge and Powell*, cited 6 *East.* 136. *Ante* Vol. I. p. 143. 22 *St. Tri.* (by Howell) p. 1.

(t) *Rex v. Cummings and another*, 5 *Mod.* 179. 1 *Bott.* 332.

(u) *Rex v. Martin*, 2 *Campb.* 269. 3 *Chit. Crim. L.* 701. 2 *Nol.* (2d ed.) 230. note (4). *Ante* Vol. I. p. 143.

(x) 3 *Chit. Crim. L.* 666. *et sequ.*

(y) *Rex v. The Minister, &c. of St. Botolph*, 1 *Black. Rep.* 443.

(z) *Ante* 140. *Rex v. Tarrant*, 4 *Burr.* 2106.

died, thereby causing great expence to the inhabitants of such parishes. (a)

It is said to have been resolved by all the Judges that writers of *false news* are indictable and punishable: and that probably at this day the fabrication of news, likely to produce any public detriment, would be considered as criminal. (b)

False news.

Where an indictment charged that the defendant, being an apprentice, and fraudulently intending to obtain money from the paymaster of a regiment, and to defraud the king, &c., procured himself to be enlisted as a soldier, without the consent of his master, by means whereof he fraudulently obtained from the paymaster divers sums of money, well knowing himself to be, without the consent of his master, disqualified from serving as a soldier, to the great deceit, fraud, &c., of the king, &c., it appears to have been admitted that this was an offence at common law. But the conviction was holden bad, on the ground that the necessary proof of the indenture of apprenticeship had not been given at the trial, there being two subscribing witnesses to the indenture, and neither of them having been produced. (c) The offence is now made punishable by a provision of the mutiny acts.

Fraud in an apprentice listing as a soldier, and obtaining the king's bounty.

A case is mentioned where a person, falsely pretending that he had power to discharge soldiers, took money from a soldier to discharge him; and being indicted for this offence, the court held the indictment to be good. (d)

Falsely pretending a power to discharge soldiers.

A curious species of fraud may be here mentioned. It is laid down in the books that, by the common law, if a person maim himself in order to have a more specious pretence for asking charity, or to prevent his being impressed as a sailor, or enlisted as a soldier, he may be indicted, and, on conviction, fined and imprisoned. (e)

Fraud by maiming in order to have a pretence to beg, &c.

Besides the offences which have been here mentioned, there are other instances of cheats clearly affecting the public, and therefore indictable; namely, such cheats as are effected by means of *false weights or measures*, which are considered as instruments or tokens purposely calculated for deceit, and by which the public in general may be imposed upon without any imputation of folly or negligence. And this reasoning is considered as applying to all cases where any species of false token is used which has the semblance of public authenticity: (f) as to a case where cloth was sold with the alneager's seal counterfeited thereon; (g) and to another case where a general seal or mark of the trade on cloth of a certain description and quality was deceitfully counterfeited. (h) And the

Cheats by means of false weights or measures.

(a) 3 Chit. Crim. L. 693, *et sequ.*
And see *ante*, vol. I. p. 140.

(b) Starkie on Lib. 546. citing 4 Read. S. L. Dig. L. L. 23. Et vide Hale's Sum. 132, et per Scroggs, C. J., Rex v. Harris, at Guildhall, 1680. 7 St. Tri. (by Howell) 929, 930.

(c) Jones's case, 1777. 1 Leach, 174. 2 East. P. C. c. 18. s. 4. p. 822.

(d) Scrlestead's case, 1 Latch. 202.

(e) 1 Hawk. P. C. c. 55. *Of maiming*, &c. s. 4. 1 Hale 412. Co. Lit. 127 a.

(f) 2 East. P. C. c. 18. s. 3. p. 820.

(g) Edwards's case, Trem. P. C. 103.

(h) Worrell's case, *Id.* 106. As to the deceitful making of linen cloth, see 3 Burn. Just., *Linen Cloth*, and 1 Eliz. c. 12. s. 1. And as to the deceitful working of woollen cloth, see 5 Burn. Just., *Woollen Manufacture*.

instances mentioned in the books of cheating by means of false dice, &c. (i) are referred to the same principle. (j)

If, therefore, a person selling corn should measure it in a bushel short of the statute measure, or should measure it in a fair bushel, but put something into the bushel to help to fill it up, it seems that he might be indicted for the cheat. (k) And a precedent is given of an indictment against a baker, who had contracted with a guardian of the poor, in the city of Norwich, to supply bread for the use of the poor, for delivering bread deficient in weight. (l) And though the knowingly exposing to sale and selling wrought gold, under the sterling alloy, as and for gold of the true standard weight, was holden not to be an indictable offence, but a private imposition only, in a common person, where no false weight or measure was used; (m) yet, if in such case the stamps or marks, required by statute on plate of a certain alloy, had been falsely used, it should seem that an indictment might have been sustained. (n) In the case in question the gold was not marked: and Aston, J., in giving his opinion, said that it was not selling by false measure, but only selling under the standard; and he cited a case in which it had been holden that selling coals under measure was not an indictable offence, but that selling them by false measure was. (o) And the result of the cases upon this subject appears to be that if a man sell by *false weights*, though only to one person, it is an indictable offence; but if without false weights he sell to many persons a *less quantity* than he pretends to do, it is not indictable. (p)

But cheats or frauds effected in the course of private transactions between individuals, fall

But though in the cases which have been thus mentioned an indictment may, and in most of them clearly is, maintainable as for a cheat or fraud at common law, on the ground that they consist of offences which affect, or may affect the public, being public in their nature, and calculated for the purposes of general fraud and deceit; yet, other cases, consisting of cheats or frauds,

(i) *Leesor's case*, Cro. Jac. 497. *Maddock's case*, 2 Roll. R. 107. 2 Roll. Ab. 78. The practice is now further punishable by penalties under the statutes 16 Car. 2. c. 7. and 9 Anne, c. 14.

(j) 2 East. P. C. c. 18. s. 3. p. 820.

(k) *Per Cur.* in *Pisckney's case*, 2 East. P. C. c. 18. s. 3. p. 820. As to the penalties for selling or buying corn otherwise than by the proper measure, see 1 Burn. Just., *Corn*.

(l) 2 Chit. Crim. L. 559. As to the assize of bread, &c. see 1 Burn. Just., *Bread*.

(m) *Rex v. Bower*, Cowp. 323. In this case the sale of the gold was by a servant of the defendant; but the court agreed that the master was responsible for the act of his servant done in the course of his employment, and within the scope of his authority. And see as to this point *Rex v. Dixon*,

ante 286. That it would be indictable in a *goldsmith* so to sell gold (under the statute) see 2 East. P. C. c. 18. s. 3. p. 820. and Cowp. 324.

(n) 2 East. P. C. c. 18. s. 3. p. 820. note (b). And see 1 East. P. C. c. 4. s. 34. p. 194. where it is said that offenders fraudulently affixing public and authentic marks on goods of a value inferior to such tokens are liable to suffer at common law upon an indictment for a cheat.

(o) The case cited was *Rex v. Lewis*. And the learned Judge also cited *Rex v. Wheatley*, 2 Burr. 1125. post. 295. See also *Rex v. Driffeld*, Say. 146.

(p) *Per Buller, J.*, in the case of *Young and others*, 3 T. R. 104. And see *Rex v. Nicholson*, cited in *Rex v. Wheatley*, 2 Burr. 1130, and *Rex v. Dunnage*, 2 Burr. 1130, *Rex v. Driffeld*, Say. 146.

effected in the course of private transactions between individuals, fall under a different consideration. This distinction, however, does not appear to have been at all times properly noticed: and, in a book of great authority, cheats, punishable at common law, are defined as “deceitful practices in defrauding or endeavouring “to defraud another of his known right by means of some artful “device contrary to the plain rules of common honesty.” (g) But this definition has been observed upon as not sufficiently distinct or accurate; and many of the authorities, from whence it seems to have originated, not involving considerations, either of public justice, public trade, or public policy, have been said to be founded either in conspiracy or forgery, which are, in themselves, substantive offences, and the latter of which was usually, when successful, prosecuted as a cheat, before the various modern statutes, by which forgeries are, in so many instances, made capital offences. (r)

under a different consideration.

Unless they amount to conspiracy or forgery, which are substantive offences.

Thus the case mentioned where the suppression of a will was holden to be indictable as a cheat, (s) is said to have been probably a case of conspiracy or combination. (t) And the same explanation is given (u) of the case where several persons were indicted for causing an illiterate person to execute a deed to his prejudice, by reading it over to him in words different from those in which it was written: (v) and also of the case of a person who was convicted upon a charge of having run a foot race fraudulently, and with a view to cheat a third person, by a previous understanding with the running competitor to win. (x)

Cases of cheats amounting to conspiracy.

In another case of a cheat at common law, which has undergone considerable discussion, the indictment charged the two defendants, Macarty and Fordenborough, that they falsely and deceitfully intending to defraud one Chowne of divers goods, together deceitfully bargained with him to barter, sell, and exchange a certain quantity of pretended wine, as good and true new Portugal wine, of him the said Fordenborough, for a certain quantity of hats, of him the said Chowne; and upon such bartering, &c. the said Fordenborough pretended to be a merchant of London, and to trade as such in Portugal wines, when, in fact, he was no such merchant, nor traded as such in wines: and the said Macarty, on such bartering, &c. pretended to be a broker of London, when, in fact, he was not: and that Chowne, giving credit to the said fictitious assumptions, personating, and deceits, did barter, sell, and

Macarty and Fordenborough's case. Cheat effected by a conspiracy; where one person pretended to be a merchant, and the other a broker; and, as such, bartered bad wine for hats.

(g) 1 Hawk. P. C. c. 71. s. 1.

(r) 2 East. P. C. c. 18. s. 2. *et sequ.* p. 817. *et sequ.* The distinction between forgery and the general class of cheats was well settled in Ward's case, Hil. T. 13 G. 1. 2 Ld. Raym. 1461. 2 Str. 747. 2 East. P. C. c. 19. s. 7. p. 860, 861. It was there shewn to be immaterial to the offence of forgery, properly so called, whether any person were prejudiced or not, provided any might have been prejudiced: but that to constitute a cheat, properly so called, there must

be a prejudice received both at common law, and under the statutes 33 H. 8. c. 1. and 30 Geo. 2. c. 24. now repealed.

(s) 1 Hawk. P. C. c. 71. s. 1. citing *Rex v. Brereton and Others*, Noy. 103.

(t) 2 East. P. C. c. 18. s. 5. p. 823.

(u) *Id. Ibid.*

(v) *Rex v. Skerrett and Others*, 1 Sid. 312., cited in 1 Hawk. P. C. c. 71. s. 1. and *Rex v. Paris and Others*, 1 Sid. 431.

(x) *Rex v. Orbell*, 6 Mod. 42. cited in the note to 1 Hawk. P. C. c. 71. s. 1.

exchange, to Fordenbrough, and did deliver to Macarty, as the broker between Chowne and Fordenbrough, for the use of Fordenbrough, a certain quantity of hats, of such a value, for so many hogsheads of the pretended new Portugal wine; and that Macarty and Fordenbrough, on such bartering, &c. affirmed that it was true new Lisbon wine of Portugal, and was the wine of Fordenbrough, when, in fact, it was not Portugal wine, nor was it drinkable or wholesome, nor did it belong to Fordenbrough; to the great deceit and damage of the said Chowne, and against the peace, &c. (y) Upon this case considerable doubts were entertained; but it seems that, ultimately, judgment was given for the crown, and that the true ground of such judgment was, that it was a case of *conspiracy*. (z) And, even if it were not a case of conspiracy; yet, as the cheat was effected by means of bartering pretended port wine, which the indictment alleged was not wholesome, or fit to drink, the vending of such an article for drinking was clearly indictable; (a) and within the principle already mentioned, of cheats or frauds, by which the public may be affected. (b)

Govers's case.
Cheat effected by
means of a
forged instrument.

In one of the principal cases where the cheat was effected by means of a *forged instrument*, the indictment charged that the defendant, intending to cheat J. S., did deceitfully take upon himself the stile and character of a merchant, and did deceitfully affirm to J. S. that he was a merchant, and had received divers commissions from Spain; and, in order to induce J. S. to believe the same, and to give him credit, the defendant deceitfully produced to J. S. *several paper writings, which he falsely affirmed to be letters from Spain*, containing commissions for jewels, watches, and other goods, to the amount of 4,000*l.*; by means whereof the defendant got into his hands two watches, the property of J. S., whereas, in truth, the defendant was not a merchant; and *the paper writings, containing such commissions, were false and counterfeit*. And it does not appear that the indictment concluded against the form of the statute, though the false tokens made use of came directly within the stat. (now repealed) 33 Hen. 8. c. 1. (c) But it is observed, that if this were sustained as an indictment at common law, the fraud being practised in a private transaction, and the false tokens mere private letters, having no

(y) *Reg. v. Macarty and Fordenbrough*, 2 Lord Raym. 1179. 3 Lord Raym. 487. 2 Burr. 1129.

(z) 2 Lord Raym. 1184. 2 Burr. 1129. 2 East. P. C. c. 18. s. 1. p. 824. Upon a recent discussion of this case, (in *Rex v. Southerton*, 6 East. 133,) it was objected to such construction that the word *conspired*, was not in the indictment; but in 2 East. P. C. *supr.* it is said that, though the indictment did not charge that the defendants *conspired, eo nomine*, yet it charged that they, *together, &c. did the acts* imputed to them; which might be considered to be tantamount.

(a) By Lord Ellenborough, C. J., in *Rex v. Southerton*, 6 East. Rep. 133.

(b) *Ante*, 285, *et sequ.* The sale of corrupted wine, contagious or unwholesome flesh, &c. is prohibited by an ancient statute, 51 Hen. 3. stat. 6., and the ordinance for bakers, c. 7. under severe penalties. And, by the stat. 12 Car. 2. c. 25. s. 11. any brewing or adulteration of wine is punished with the forfeiture of 100*l.* if done by the wholesale merchant, and 40*l.* if done by the vintner, or actual trader. See 4 Black. Com. 162.

(c) *Rex v. Govers*, 2 Say. 206. 2 East. P. C. c. 18. s. 6. p. 824, 825.

semblance of public authenticity, the only ground on which the judgment can be maintained, without going the length of saying that the repealed stat. of 33 Hen. 8. c. 1. was merely declaratory of the common law, is, that the cheat was effected by means of a *forgery*, (in which all are principals at common law;) and that the publication of such forged instruments, for the purpose of deceit, was in itself a substantive offence, indictable at common law. (d) And, in a case where the defendant was indicted for falsely and deceitfully obtaining 450*l.* from one W. Harle, by a false token, *viz.* a promissory note, in the name of R. Hales, payable to J. E., &c. with a counterfeit indorsement thereon, the jury were directed that they must find the defendant guilty if it appeared to be a forged instrument; the instrument being a false token. (e) But a forgery could not, it seems, be prosecuted at common law as a cheat, unless it were successful; as in a case where the defendant was convicted of forgery at common law of an acquittance, the court said, that there was no reason why the offence should not be punished as a forgery, as well as if the thing fabricated had been a deed, but that it could not be prosecuted as a cheat at common law without an *actual prejudice*, which was an *obtaining* on the statute 33 Hen. 8. (f)

Other cases of forgeries prosecuted as cheats at common law.

It does not appear, therefore, that these cases, when duly examined, are contrary to that which has been given as a more accurate definition of cheats and frauds, punishable at common law, namely, "The fraudulent obtaining the property of another, by any deceitful and illegal practice or token, (short of felony,) *which affects or may affect the public.*" (g) And there are many cases by which it is supported; tending to shew, that a cheat or fraud, effected by an unfair dealing and imposition on an individual, in a private transaction between the parties, cannot be the subject of an indictment at common law.

The more accurate definition of cheats, &c. at common law describes them as affecting the public.

In several of these cases of impositions upon individuals in private transactions, which have been holden not to be indictable, the cheat was effected by a mere false affirmation, or bare lie. Thus an indictment was quashed, upon motion, which charged the defendant with selling at market a sack of corn, which he falsely affirmed to be a Winchester bushel, whereas it was greatly deficient; and the court said, that this was no more than telling a lie. (h) And an indictment was also quashed which charged the defendant with selling to a person eight hundred weight of gum, at the price of seven pounds by the hundred weight, falsely pretending and affirming that the gum was gum seneca, and that it was worth seven pounds by the hundred weight; whereas, in

Cheats by means of a bare lie, or false affirmation, in a private transaction, holden not to be indictable.

(d) 2 East. P. C. c. 18. s. 6. p. 825.

(e) Hales's case, *cor.* Pengelly, C. B., and other Judges, 1729. 9 St. Tri. 75. 2 East. P. C. c. 18. s. 6. p. 825.: a case of misdemeanor at common law, before the statute making the offence felony.

(f) Ward's case, 2 Str. 749. And see further the authorities collected upon this subject in 2 East. P. C. c. 18.

s. 2. p. 817, note (a), and *Id.* s. 6. p. 825.

(g) 2 East. P. C. c. 18. s. 2. p. 818.

(h) Pinckney's case, 2 East. P. C. c. 18. s. 2. p. 818., cited in 2 Burr. 1129. But see *ante*, 290; that this case might have come under a different consideration if the vendor had fraudulently *measured* the corn.

truth, the gum was not gum seneca, but a gum of an inferior kind, and was not worth more than three pounds by the hundred weight. (i) And a case was holden not to be indictable where the defendant obtained money of another, by pretending that he was sent by a third person for it: and Holt, C. J. said, "Shall we indict one man for making a fool of another? Let him bring his action." (k) In another case the indictment set forth, that the defendant came to the shop of a mercer, and affirmed that she was a servant to the Countess of Pomfret, and was sent by her from St. James's to fetch silks for the queen, endeavouring thereby to defraud the mercer; whereas, in fact, she was no servant of the Countess of Pomfret, nor was sent upon the queen's account: and it was moved in arrest of judgment that this was not an indictable offence, there being no false token, nor any actual fraud committed; and the Court arrested the judgment, saying that the case was no more than telling a lie. (l)

And the same construction will prevail, though an apparent token be used, if it be of no more credit than the party's own assertion.

Lara's case; where the defendant gave a check upon his banker, which he knew he had no authority to draw, and that it would not be paid.

And it appears that the same construction will prevail, though the defendant make use of an apparent token; which in reality is, upon the very face of it, of no more credit than his own assertion. (m) An indictment at common law charged that the defendant, deceitfully intending, by crafty means and devices, to obtain possession of certain lottery tickets, the property of A., pretended that he wanted to purchase them for a valuable consideration, and delivered to A. a fictitious order, for payment of money, subscribed by him the defendant, &c. purporting to be a draft upon his banker for the amount, which he knew he had no authority to draw, and that it would not be paid; but which he falsely pretended to be a good order, and that he had money in the banker's hands, and that it would be paid; by virtue of which he obtained possession of tickets, and defrauded the prosecutor of the value. And the defendant having been convicted, the Court of King's Bench arrested the judgment. Grose, J. said, "That, in order to "make this case something more than a bare naked lie, it had "been said that the defendant used a false token, for that he gave "a check on his banker; but that was only adding another lie; "and that if the Court should determine that this case was indictable, he did not know how to draw the line; for it might "equally be said that every person who overdrew his banker used

(i) *Rex v. Lewis*, Say. 205. Indictments quashed upon motion may be considered as authorities; but no stress can be laid on several cases to be found in the books, particularly in *Mod. Rep.*, where indictments of this kind were *refused* to be quashed upon motion, because it was the practice of the court, as often declared, not to quash on motion indictments for offences founded in fraud or oppression, but leave the defendants to plead; 2 *East. P. C. c. 18. s. 2. p. 818.* note (a), citing 5 *Mod. 13.* 6 *Mod. 42.* 12 *Mod. 49.*

(k) *Reg. v. Jones*, 1 *Salk. 379.* 2 *Lord Raym. 1013.* And see also *Reg.*

v. Hannon, 6 *Mod. 311.* and 2 *Hawk. P. C. c. 71. s. 2.*; and *Nehuff's case*, *Salk. 151.*, where the defendant borrowed 600*l.* of a feme covert, and promised to send her fine cloth and gold dust, as a pledge, and sent no gold dust, but some coarse cloth, worth little or nothing; and the Court said that it was not a matter criminal, and that it was the prosecutor's fault to repose such a confidence in the defendant.

(l) *Rex v. Bryan*, 2 *Str. 866.* In the case as cited in 2 *East. P. C. c. 18. s. 2. p. 819.*, it is said that the defendant *obtained* the goods.

(m) 2 *East. P. C. c. 18. s. 2. p. 819.*

"a false token, and might be indicted for it." Lawrence, J. said, "It is admitted that a mere false assertion, unaccompanied by a recommendation, is not indictable; and, I think, there is nothing in this case beyond the defendant's own false assertion." (n)

So in a case where the defendant, a brewer, was indicted for a cheat, in sending to the keeper of an alehouse so many vessels of ale, *marked* as containing such a measure, and writing a letter to him, assuring him that they did contain that measure, when, in fact, they did not contain such measure, but so much less, &c.; the indictment was quashed upon a motion, after argument, as containing no criminal charge. (o) Foster, J., indeed doubted concerning this case when it was cited, because it seemed to him that the vessels being *marked* as containing a greater quantity than they really did, were *false tokens*. (p) But as it does not appear that cheating, by means of mere private or *privy* tokens, was punishable at common law, without the aid of the statute (now repealed) of 33 Hen. 8. c. 1. (q) it is well observed, upon this doubt of the learned Judge, that possibly the Court, in deciding the case, thought that those marks, not having even the semblance of any public authority, but being merely the private marks of the dealer, did, in effect, resolve themselves into no more than the dealer's own affirmation, that the vessels contained the quantity for which they were marked. (r)

Where an indictment charged the defendant; for that he, keeping a common grist-mill, and being employed by one Bare to grind three bushels of wheat, did, with force and arms, unlawfully take and detain forty-two pounds weight of wheat; judgment was given for the defendant upon a demurrer, there being no actual price laid, nor any charge of taking as for unreasonable toll; and it being a matter of a private nature, for which an action would lie. (s)

The following case has been considered to have clearly established the true boundary between those frauds that are, and those that are not indictable at common law. (t) The defendant, a brewer, was charged, by an indictment at common law, for that he, intending to deceive and defraud one Richard Webb of his money, falsely, fraudulently, and deceitfully, sold and delivered to him sixteen gallons of amber, for and as eighteen gallons of the same liquor, and received fifteen shillings, as for eighteen gallons, knowing there were only sixteen gallons. And this was holden clearly not to be an indictable offence, but only a civil injury, for which an action lay to recover damages. Lord Mansfield, C. J., said, "It amounts only to an unfair dealing, and an imposition on this particular man, by which he could not have suffered but from his own carelessness, in not measuring the liquor when he

Wilders's case; where the defendant sent vessels of ale *marked*, as containing a certain measure; and wrote a letter, affirming that the vessels did contain such measure.

Channell's case. The defendant, a miller, was charged with detaining corn; but this was holden to be matter of a private nature, not indictable.

Wheatley's case. Selling sixteen gallons of liquor instead of eighteen, holden to be only an unfair dealing, and imposition on an individual, and not an indictable offence at common law.

(n) *Rex v. Lara*, 1796, 6 T. R. 565. 2 Leach 652. 2 East. P. C. c. 18. s. 2. p. 819. But see in *Rex v. Jackson*, *post*. a different doctrine laid down upon an indictment on the statute 36 Geo. 2. c. 24. as to a check drawn on a banker with whom the party keeps no cash.

(o) *Rex v. Wilders*, cited by Ld. Mansfield, and supplied by Denison,

J., in *Rex v. Wheatley*, 2 Burr. 1128.

(p) 2 Burr. 1129.

(q) 2 East. P. C. c. 18. s. 9. p. 833, 834.

(r) 2 East. P. C. c. 18. s. 3. p. 820.

(s) Channell's case, 2 Str. 793. 2 East. P. C. c. 18. s. 2. p. 818. And see *Rex v. Haynes*, *post*. 296.

(t) By Ld. Kenyon, C. J., in *Lara's* case, 6 T. R. 569.

"received it; whereas fraud, to be the object of criminal prosecution, must be of that kind which, in its nature, is calculated to defraud numbers, as false weights or measures, false tokens, or where there is a conspiracy." (u)

The doctrine that an indictment for a cheat at common law, cannot be maintained upon a mere false affirmation, has been subsequently recognized. (x)

Haynes's case. The doctrine of a transaction in the nature of an unfair dealing, and imposition upon a particular individual, not being indictable at common law, further established in this case; where a miller was charged with receiving good barley to grind at his mill, and delivering meal in return different from the produce of the barley, and musty, &c.: and it was holden not to be indictable.

And in a case of recent occurrence, the doctrine of a transaction in the nature of an unfair dealing, and imposition upon any particular individual, not being an indictable offence at common law, was still further established. The indictment, in substance, charged the defendant, a miller, with receiving good barley to grind at his mill, and delivering a mixture of oat and barley meal, different from the produce of the barley, and which was musty and unwholesome: and the defendant having been found guilty, it was assigned for error, amongst other things, that no indictable offence was charged against him. As to one of the grounds upon which it was contended that the offence charged was not indictable, namely, that the statement should have been, that the defendant delivered the barley "to be eaten as for food," and that it was "not fit to be eaten by man;" (y) Lord Ellenborough, C. J., said, that if the indictment had alleged that the defendant delivered the barley as an article for the food of man, it might possibly have been sustained; but that he could not say that its being musty and unwholesome, necessarily, and *ex vi termini*, imported that it was for the food of man; and it was not stated that it was to be used for the sustentation of man, only that it was a mixture of oat and barley-meal. As to the other point, that this was not an indictable offence, because it respected a matter transacted in the course of trade, and where no tokens were exhibited by which the party acquired any greater degree of credit; his lordship said that, if the case had been that this miller was owner of a soke mill, to which the inhabitants of the vicinage were bound to resort, in order to get their corn ground, and that the miller, abusing the confidence of this his situation, had made it a colour for practising a fraud, this might have presented a different aspect: but, as it then stood, it seemed to be no more than the case of a common tradesman who was guilty of a fraud in a matter of trade or dealing, such as was adverted to in *Rex v. Wheatley*, and the other cases, as not being indictable. (z)

Again, in a still more recent case, where the indictment against

(u) *Wheatley's case*, 2 Burr. 1125. 1 Black. Rep. 273. 2 East. P. C. c. 18. s. 2. p. 818. And see *ante*, 290, *et sequ.*

(x) By Ld. Kenyon, C. J., in *Rex v. Gibbs*, 1 East. R. 185.

(y) See *Treeve's case*, *ante*, 286.

(z) *Rex v. Haynes*, 4 M. & S. 214. *Qu.* therefore the case of *Rex v. Wood*, 1 Sess. Cas. 217. where the defendant, being a miller, and indicted for *changing* corn delivered to him to be ground, and giving bad

corn instead of it; a motion was made to quash the indictment, because the transaction was only a private cheat, and not of a public nature; but it was answered that, being a cheat in the way of trade, it concerned the public; and the Court were unanimous not to quash it. And see the observations as to the authority of cases of this kind, in which the Court refused to quash the indictment, *ante*, 294, note (i).

the defendants was for a conspiracy to cheat and defraud the prosecutor by selling him an unsound horse; and the case did not, upon the evidence, assume the shape of a conspiracy; Lord Ellenborough, C. J., said, that if such a transaction were to be considered as an indictable offence, then, instead of all the actions which had been brought on warranties, the defendants ought to have been indicted as cheats: and that no indictment in a case like this could be maintained, without evidence of concert between the parties to effectuate a fraud. And the defendants were, accordingly, acquitted. (a)

Pywell's case.
Selling an unsound horse
not indictable.

These cases seem sufficiently to support the definition above adopted, (b) and to shew that the cheat or fraud must be effected by some deceitful and illegal practice or token, *which affects, or may affect the public*, in order to be indictable at common law. And it seems also to result from these cases that a cheat or fraud, in order to be punishable by the common law, must be such against which common prudence could not have guarded. (c) Indeed it can hardly be supposed that a cheat will much affect the public which is open to the detection of any man of common prudence.

With respect to the indictment for a cheat or fraud at common law, it may be briefly observed, that where the transaction has been effected by false tokens, and the offence is so charged, it is necessary to specify and set forth what the false tokens were; and it is not sufficient to allege generally that the cheat was effected by certain false tokens or false pretences. (d) But it does not seem to be necessary to describe them more particularly than they were shewn or described to the party at the time, and in consequence of which he was imposed upon; and it is also said not to be necessary to make any express allegation that the facts set forth shew a false token. (e) An objection appears to have been made to one of the counts of an indictment for a cheat at common law, that it charged the false pretence to have been made to one person, and the deceit to have been practised on a different person. (f)

Indictment.

The punishment of this offence at common law is, as in other cases of misdemeanor, by fine, imprisonment, or further by infamous corporal pain, in aggravated cases. (g)

Punishment.

(a) *Rex v. Pywell and Others*, 1 Stark. R. 402.

(b) *Ante* 293.

(c) 1 Hawk. P. C. c. 71. s. 1, 2. *Rex v. Wheatley*, 2 Burr. 1125, *ante* 295. By Fielding *arguend.* in the case of *Young and Others*, 3 T. R. 99. assented to by Buller, J., *id.* 104.

(d) 2 East. P. C. c. 18. s. 13. p. 837.

(e) 2 East. P. C. c. 18. s. 13. p. 838.

(f) *Lara's case*, 2 Leach 647.

(g) 1 Hawk. P. C. c. 71. s. 3. 2 East. P. C. c. 18. s. 13. p. 838.

SECTION. II.

Of Cheats and Frauds by means of False Pretences, within the Statute 7 & 8 Geo. 4. c. 29. s. 53.

7 & 8 Geo. 4. c. 29. s. 53. Obtaining money, &c. by false pretences a misdemeanor.

No acquittal on the ground that the case proved amounts to larceny.

Statement of ownership of property.

Cases upon the repealed statute 30 Geo. 2. c. 24.

Rex v. Young, and others. Indictment on the repealed act 30 Geo. 2. c. 24. for obtaining money under the false pre-

THE statute 7 & 8 Geo. 4. c. 29. s. 53. reciting that a failure of justice frequently arose from the subtle distinction between larceny and fraud, for remedy thereof, enacts "that if any person shall by any false pretence obtain from any other person any chattel, money, or valuable security, with intent to cheat or defraud any person of the same, every such offender shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of seven years, or to suffer such other punishment, by fine or imprisonment, or by both, as the Court shall award: provided always, that if upon the trial of any person indicted for such misdemeanor it shall be proved that he obtained the property in question in any such manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted of such misdemeanor; and no such indictments shall be removable by *certiorari*; and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for larceny upon the same facts."

The enactments of the statute 7 Geo. 4. c. 64. as to the statement in the indictment of the ownership of property in particular instances of partners, counties, parishes, turnpike-trustees, &c. have been stated in the preceding Chapter upon larceny. (a)

Some of the cases decided upon the repealed act, 30 Geo. 2. c. 24. may assist in the construction of the recent statute.

That act, after reciting that evil disposed persons had, by various subtle stratagems, &c. fraudulently obtained divers sums of money, goods, &c. to the great injury of industrious families, and to the manifest prejudice of trade and credit, enacted "that all persons who, knowingly and designedly, by false pretence or pretences should obtain from any person or persons, money, goods, wares, or merchandizes, with intent to cheat or defraud any person or persons of the same, should be deemed offenders against law and the public peace," and should be punished, &c. as therein mentioned.

In an indictment framed on this repealed statute, the first count charged that the four defendants, Young, Randal, Mullins, and Osmer, fraudulently intending to obtain the money of the king's subjects, by false colours and pretences, unlawfully and knowingly, &c. did falsely pretend to one Thomas, that Young had made a bet of five hundred guineas on each side, with a colonel in the army, then at Bath, that one Wm. Lewis would, on the next day,

(a) *Ante*, p. 166, *et sequ.*

run on the high road, leading from Gloucester to Bristol, ten miles in length, within one hour; and that Young and Mullins did go two hundred guineas each in the bet, and Randal did go the other hundred guineas: and that, under colour and pretence of such bet, they obtained from Thomas, as a part of such pretended bet, twenty guineas of the five hundred guineas; by which said false pretences the defendants unlawfully, &c. obtained from the said Thomas the said twenty guineas, with intent to cheat and defraud him thereof; whereas, in truth, no such bet had been made, &c. against the form of the statute, &c. A second count stated the bet to have been made between Young and Osmer. The defendants having been found guilty, this indictment was removed by writ of error into the Court of King's Bench, and several errors assigned; one of which was, that the supposed false pretences shewn in the first and second counts were neither contrary to a statute 33 Hen VIII. c. 1. (also now repealed) or the 30 Geo. 2. c. 24., or any other statute. And it was argued that the transaction itself was not the subject matter of a criminal prosecution, for that it did not affect the public; and that it was one against which common prudence might have guarded: for, as it was the representation of a *future* transaction, the party had an opportunity of inquiring into the truth of it, and therefore it was his own fault if he were deceived: but the objection was overruled. Lord Kenyon, C. J. said. "Undoubtedly this indictment, being founded "on the statute of 30 Geo. 2. c. 24., is different from a common "law indictment. When it passed it was considered to extend to "every case where a party had obtained money by falsely representing himself to be in a situation in which he was not, or "any occurrence that had not happened, to which persons of "ordinary caution might give credit. The statute of 33 Hen. 8. "c. 1. requires a false seal, or token, to be used in order to bring "the person imposed upon into the confidence of the other; but "that being found to be insufficient, the statute 30 Geo. 2. c. 24. "introduced another offence, describing it in terms extremely "general. It seems difficult to draw the line, and to say to what "cases this statute shall extend; and therefore we must see whether "each particular case, as it arises, comes within it." His lordship then adverted to the facts of the case before the Court; and after saying that the defendants, morally speaking, had been guilty of an offence, proceeded thus: "I admit that there are certain irregularities which are not the subject of criminal law. But when "the criminal law happens to be auxiliary to the law of morality, "I do not feel any inclination to explain it away. Now this "offence is within the words of the act; for the defendants have, "by false pretences, fraudulently contrived to obtain money from "the prosecutor; and I see no reason why it should not be held "to be within the meaning of the statute." Ashurst, J. said, in giving his opinion, "The statute 30 Geo. 2. c. 24. created an "offence which did not exist before, and I think it includes the "present. The legislature saw that all men were not equally "prudent, and this statute was passed to protect the weaker part "of mankind. The words of it are very general, 'All persons "who knowingly by false pretences shall obtain from any person

tence of sharing a supposed bet, said to have been before laid with another; and which was to be decided the next day.

"money, goods, &c. with intent to cheat or defraud, &c.' and we "have no power to restrain their operation." And Buller, J., after observing upon the statute 33 H. 8. says, "The legislature "thought that the former statute was too limited; and therefore "the 30 Geo. 2. c. 24. was passed; which enacts, 'That all "persons who shall obtain money from others by *false pretences*, "with intent to cheat or defraud such persons, shall be deemed "offenders against the public peace.' The statute, therefore, clearly "extends to cases which were not the subject of an indictment at "common law. The ingredients of this offence are, the obtaining "money by false pretences, and with an intent to defraud. Barely "asking another for a sum of money is not sufficient: but some "pretence must be used, and that pretence false; and the intent "is necessary to constitute the crime. If the intent be made out, "and the false pretence used in order to effect it, it brings the "case within this statute." (b)

Question made upon the repealed act 30 Geo. 2. c. 24. whether it extended the law to cases against which common prudence might guard?

It was argued in this case, that even the generality of the term "false pretences," in the statute 30 Geo. 2. c. 24. did not extend the law to cases against which common caution might guard: but Ashhurst, J. said, as we have seen, that as all men were not equally prudent, this statute was passed to protect the weaker part of mankind; still, however, it has been observed, that it might have been a question whether the statute extended to every false pretence, either absurd or irrational upon the face of it, or such as the party had, at the very time, the means of detecting at hand; or whether the words, which were general, should have been construed co-extensively with the cheat actually effected by means of the false pretence used. And it was suggested, that these might perhaps, be matters proper for the consideration of the jury, with the advice of the Court. (c)

A pretence that the party would do an act which he did not mean to do, (as a pretence that he would pay for goods on delivery) was holden not to be a false pretence within this statute. The prisoner bargained for the carcasses of three sheep and some other meat, and, the seller having refused to trust him, promised to pay for them on delivery: but he did not mean to do so, and when they were delivered, sent back an evasive letter. The indictment was for obtaining the carcasses and meat by falsely pretending he would pay for them on delivery, whereas he did not, and never meant to do so; and he was convicted; but upon a case reserved, the Judges thought this was not a pretence within the statute; that it was merely a promise for future conduct; and that common caution would prevent any injury from the breach of it; and therefore that the conviction was wrong. (d)

A pretence to a parish officer, as an excuse for not working, that the party had no clothes when he really had, though it induced the officer to give him clothes, was holden not to be obtaining goods by false pretences within the meaning of the same statute, 30 Geo. 2. The overseer of the prisoner's parish asked him why he did not work to support his family, which received parish

(b) *Rex v. Young and others*, 1789.

3 T. R. 98.

(c) 2 East. P. C. c. 18. s. 8. p. 828.

(d) *Rex v. Goodhall*, Mich. T. 1821.

MS. Bayley, J., and Russ. & Ry. 461.

relief; the prisoner said he had no shoes; upon which the overseer gave him a pair; but the prisoner had at the time two good pairs. Upon a case reserved, the Judges thought that this was not within the act, and that the conviction was wrong; for it was rather a false excuse for not working, than a false pretence to obtain goods. (e)

In the case of Young and others, abovementioned, Buller, J. cited the following, as a case in point: the defendant, Count Villeneuve, applied to Sir T. Broughton, telling him that he was intrusted by the Duke de Lauzun to take some horses from Ireland to London, and that he had been detained so long by contrary winds that his money was spent; by which representation Sir T. Broughton was induced to advance some money to him; after which it turned out, that the prisoner never had been employed by the Duke de Lauzun, and that his whole story was a fiction. For this offence he was convicted, and sentenced to hard labour on the Thames. (f)

It was agreed upon by all the Judges, that a case was within the repealed statute 30 Geo. 2. c. 24. where the *credit was created by means of the false pretence*; and they held that in the following case the prisoner would not have obtained the credit, but for the false account which he delivered. The evidence was that the prosecutors, from whom the prisoner was charged with obtaining money by false pretences, were clothiers; that the prisoner was a shearmen, in their service, and employed to superintend the other shearmen, and to take an account of the persons employed, and of the amount of their wages and earnings; that at the end of each week he was supplied with money to pay the different shearmen by the clerk of the prosecutors, who advanced to him such sum as, according to a written account or note delivered to him by the prisoner, was necessary to pay them. The prisoner was not authorized to draw from the clerk, for money generally on account, but *merely for the sums actually earned by the shearmen*; and the clerk was not authorized to pay him any sums except what he carried in in his account or note as the amount of what was due to the shearmen for the work they had done. It appeared that the prisoner on the 9th of September, 1796, delivered to the prosecutor's clerk a note in writing in the following form, "9th September, 1796, Shearmen £44. 11s. 0d.," which was the common form in which he made out his account of the amount of their week's wages. And it further appeared, that in a book in his hand-writing, which it was his business to keep, (of the men employed, of the work they had done, and of their earnings), there were the names of several men who had not been employed, who were entered as having earned different sums of money, and also false accounts of the work done by those who were employed; so as to make out the sum stated in the note to be due to the shearmen. Upon this evidence, the jury found the prisoner guilty; but sentence was respited in order to take the opinion of the Judges, whether this case were within the statute 30 Geo. 2.

Count Villeneuve's case. Money obtained by the prisoner, on the false pretence of being intrusted by a foreign nobleman to take some horses from Ireland to London; and being detained till his money was spent, holden to be within the 30 Geo. 2. c. 24.

Witchell's case. A superintendent in a clothing manufactory having to keep an account of the number of shearers employed, and the amount of their earnings and wages, and to deliver it in every week, delivered in a false account, by which he obtained a larger sum than was due; and it was holden to be within the 30 Geo. 2. c. 24.

(e) *Rex v. Wakeling*, Hil. T. 1823. C.J. of *Chester*, and Buller, J., *Chester*, Russ. & Ry. 504. 1778. 3 T. R. 104, 106.

(f) Villeneuve's case, *cor* Moreton,

c. 24., the prisoner's counsel contending that no cases were within the statute but those where the original credit was obtained by means of the false pretence; and that it did not extend to cases where there was a previous confidence, as he said was the case here. The Judges, after some difference of opinion, ultimately all agreed on the principle, that if the false pretence created the credit, the case was within the statute; and they considered that in this case the defendant would not have obtained the credit, but for the false account which he had delivered in, and therefore that he was properly convicted. (g)

Story's case. The prisoner obtained money from the keeper of a post-office, by assuming to be the person mentioned in a money order, which he presented for payment: but he did not make any false declaration or assertion in order to obtain the money.

In the following case it was contended, that where a party obtained money, by assuming a character which did not belong to him, *without making any false declarations or assertions*, the repealed statute of 30 Geo. 2. did not apply. The indictment charged, that the prisoner fraudulently and deceitfully produced and delivered to E. the wife of John Rayner, which John Rayner was employed in the business of the post office, as deputy post-master of the town of Nottingham, an order for payment of money, commonly called a money order, to wit, for the payment of the sum of one pound, to one John Storer; and that he unlawfully, &c. pretended to the said E. Rayner, that he was the person named in the same order, by means of which false pretence, he unlawfully, &c. obtained from the said E. Rayner the sum of one pound of the monies of the said John Rayner, with intent to cheat and defraud the said John Rayner; averring also, that the prisoner was not the person named in the order, nor the person entitled to receive the money therein mentioned. There was a second count differing from the first only in alleging the money to be John Storer's, and the intent to be to cheat him. It appeared in evidence, that the prisoner went to the post-office at Nottingham, and inquired of Mrs. Rayner, who transacted the business there for her husband, if there were any letters directed to "John Story, post-office, Nottingham, to be left till called for." Mrs. Rayner finding amongst the letters one directed for "John Storer, to be left till called for, Nottingham," and supposing it to be the letter for which the prisoner inquired, delivered it to him. The direction then upon the letter was a re-direction of it from Northampton, to which place it had been originally sent from Nottingham. The prisoner, on receiving it, objected to the payment of two shillings for the postage, saying, "It was too much from Manchester;" but he paid the money, and went with the letter into the office passage, where he remained a sufficient time to have read it, after which he returned into the office with the money order in question, which had been enclosed in the letter, and offered it to Mrs. Rayner. Mrs. Rayner told him, he must write his name on the back of the order before she could pay him the money, upon which he wrote his real name, John Story, and she paid him with a one pound

(g) Wittchell's case, East. T. and Trin. T. 1798. 2 East. P. C. c. 18. s. 8. p. 830. One of the Judges observed, that the prisoner was not to

have any sum he thought fit, on account; but only so much as was worked out.

note. He then told her, that if she would look again she would find another letter for him, from Manchester, which she did, and he paid for it. The order in question (which was signed by Mrs. Rayner in the name of her husband), was in the following form :

“ No. 52. Order given by one Deputy on another.

“ £1. Post-Office, Nottingham, Augt. 2d, 1804.

“ At sight pay John Storer, according to my letter of advice of
“ the number and date, the sum of one pound, and place the
“ same to the account of the money order office.”

“ J. Rayner.”

“ To the Post-master of Northampton.

“ This order must be signed by the person to whom it is made
“ payable, and sent up with the quarterly account, as a voucher
“ for the payment.”

The terms of the letter clearly explained, that the order could not have been intended for the prisoner : and it was proved, that when he was first apprehended, he denied having received the money, or having ever seen Mrs. Rayner : but he afterwards assigned a want of money as the reason of his conduct. In the conversation with Mrs. Rayner, she never asked him, if he was the person for whom the letter and order were intended ; nor did he say, that he was so. The prisoner's counsel contended, that as the order was given to the prisoner by Mrs. Rayner herself, and the prisoner had merely presented it to her for payment, without making any untrue declaration or assertion, the case was not within the statute. The learned Judge left it to the jury to find against the prisoner, if they were satisfied, that by his conduct he had fraudulently assumed a character which did not belong to him, although he had made no false assertions : and the jury found him guilty. But the sentence was respited, in order to take the opinion of the Judges, as well upon the objection made as upon a further doubt, whether the signature of the prisoner's name, under the circumstances, did not amount to a forgery of a receipt for money, in which the lesser offence was merged. All the Judges were of opinion that this did not appear to be a forgery, the prisoner having signed his own name, which was not the same name as that of the person to whom the note was payable : and upon the other objection, they held that the prisoner was properly convicted of obtaining the money by a false pretence, because by presenting the order for payment, and signing at the post-office, he represented himself to Mrs. R. as the person named in the note. (h)

It appears also, from the following case, that there might be a sufficient false pretence within the same repealed statute 30 Geo. 2. by the acts and conduct of the party, without any verbal representations of a false and fraudulent nature. The count in the indictment upon that statute stated, that the prisoner, intending to cheat and defraud John Beebee, of his monies, goods, and

Freeth's case.
The fact of uttering a counterfeit note as a genuine note, held to be tantamount to a representation that it was so.

(h) *Rex v. Story*, East. T. 1805. MS., and Russ. & Ry. 81.

merchandizes, on, &c.; did falsely, &c. utter, publish, offer, and tender to the said J. B. a false, forged, and counterfeit paper, as and for a true paper, and did then and there falsely, knowingly, and designedly, fraudulently and wickedly, pretend to the said J. B. that the said false, &c. paper was a true paper, and signed by one Wm. Sparrow, which paper was as follows :

Wolverhampton, 27 Feb. 1807.

I promise to pay the bearer on demand the sum of ten shillings and six-pence.

Wm. Sparrow.

with intention the monies, goods, &c. of the said J. B. to obtain, well knowing such paper to be forged and counterfeit; by means of which false pretences, he did obtain from the said J. B. a sum of money, to wit, nine shillings and tenpence, against the form of the statute, &c. The third count stated, that the prisoner, contriving and intending to cheat and defraud the said J. B. of his monies, goods, &c., on, &c. did fraudulently and wickedly utter, publish, offer, and tender to the said J. B. a false, forged, and counterfeit paper, as and for a true paper, and which he then and there did pretend and represent to the said J. B. to be a true paper, subscribed, &c. (and setting forth the paper,) with intention to cheat and defraud the said J. B. and the monies, goods, &c. of the said J. B. fraudulently to obtain, well knowing the said paper to be forged, &c. by means of which last mentioned false pretences, he did then and there fraudulently obtain from the said J. B. a sum of money, to wit, nine shillings and ten-pence, of the money of the said J. B. It appeared by the evidence of John Beebee, that the prisoner came to his shop at Bilston, on a Saturday night, and asked for a loaf; that he served him with one for five-pence; that the prisoner then asked for some tobacco, and the witness served him with an ounce for three-pence, upon which the prisoner threw down a note for ten shillings and six-pence. The witness said he had no change, but in copper, which the prisoner said would do; and the witness then gave him nine shillings and ten-pence, in copper, which he took, together with the loaf and tobacco, and went away. The note was that which was set forth in the indictment, and was a forged note: and it was proved that the prisoner, in the course of the same evening and the next morning, put off several other notes of the same kind and amount, and all forged. Sparrow was a person of good credit; and his notes under twenty shillings were generally circulated in that neighbourhood, as it was found impracticable to pay in cash, or larger notes, the wages of the numerous day-labourers engaged in the iron manufactories. But by the statute 15 Geo. 3. c. 51. s. 1. promissory notes, &c. negotiable for any sum less than twenty shillings, were declared absolutely void and of no effect; and the second section of that act declared, that if any person should publish or utter such notes, &c. for a less sum than twenty shillings, or should negotiate the same, he should forfeit any sum not exceeding twenty pounds, nor less than five pounds; the third section gave directions as to the form of conviction. The counsel

for the prisoner objected, first, that this was not a case within the 30 Geo. 2. c. 24. the general expressions of that statute being confined to cases of false suggestions of fact, as in the case of Young, and others; (i) to cases where the party falsely represents himself to be in a situation which he is not, as a servant of another, or as having his order or authority, or produces a false account of disbursements, on the face of which the party would be entitled to be reimbursed, as in *Witchell's case*; (k) and to those cases where credit is acquired, and the monies, &c. are obtained by the false pretence. And it was urged, that in this case the credit was given to the note, and to no representation or pretence of the prisoner himself; that the fraud consisted in the fabrication of the instrument, not in any representation made by the prisoner. But the learned Judge who tried the prisoner thought that the uttering it as a genuine note was tantamount to a representation that it was so. An objection was also taken, as to this being a cheat at common law, upon the ground that as a note of this sort was void, and prohibited by law, it was no offence to forge it, or to obtain money upon it when forged, as the party taking it ought to be upon his guard. The case was, however, left to the jury, with a direction that the evidence, if true, sustained both or one of the latter counts of the indictment: and the jury found the prisoner guilty on both these counts; and the learned Judge respited the sentence, for the purpose of submitting the points to the consideration of the twelve Judges. All the Judges (except *Rooke, J.*) being present, the majority of them thought that the conviction was right, and that it was a false pretence, although the note, upon the face of it, would have been good for nothing in point of law, if it had not been false. *Lawrence, J.*, was of a different opinion, and thought that the shop-keeper was not cheated if he parted with his goods for a piece of paper, which he must be presumed in law to know was worth nothing if true. (l)

The prisoner was tried before *Garrow, B.*, at the *Stafford Summer Assizes, 1821*, on an indictment, which charged that he did falsely, fraudulently, and deceitfully, deliver to one *Joseph Blood*, certain papers, purporting to be promissory notes of bankers at *Oundle*, as and for good and available notes (one of which was set out;) and that *Blood* believing them to be good and available, delivered to the prisoner a gelding, of the price of 12*l.* his property; whereas the notes were not good and available, but of no value, as the prisoner then well knew; and so the prisoner, by colour of the said papers, unlawfully, &c. did obtain, and get into his possession from *Blood*, the said gelding, with intent to cheat him of the same, and of his said gelding, did cheat and defraud him, &c.

It appeared in evidence, that the prisoner, on the 4th of June, 1821, bought of the prosecutor, at *Rugeley fair*, the gelding in question, for the price of 12*l.*, and tendered in payment, notes to that amount on the *Oundle bank*. On the prosecutor's objecting to accept these notes, the prisoner assured him they were good

Flint's case.
Indictment for delivering, in payment for a horse, certain promissory notes as for good and available promissory notes, which the prisoner knew to be not good, nor of any value. The notes purport- ed to be the notes of a country bank, which was sup- posed to have failed. Held, that at all events it was

(i) *Ante*, 298.(k) *Ante*, 301.

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(l) *Freeth's case*, 1807, MS., and
x *Russ. & Ry.* 127.

necessary to prove the notes were bad, and of no value.

notes, and upon this assurance the prosecutor parted with the gelding. It further appeared, that these notes had never been presented by the prosecutor at *Oundle*, or at Sir James Esdaile's, in London, where they were made payable.

A witness stated, that he recollected Rickett's bank at *Oundle*, that he knew nothing but what he saw in the papers, and heard from people who had bills there. The notes appeared to have been exhibited under a commission of bankrupt against the *Oundle* bank; the words importing the memorandum of exhibit, had been attempted to be obliterated; but the names of the commissioners remained on each of them. The jury found the prisoner guilty; and said, they were of opinion, that when he bargained for, and obtained the horse, he well knew that the notes were of no value, and that it was his intention to cheat the prosecutor of his horse. But the learned Judge respited the judgment, and submitted the case to the consideration of the Judges, who held the conviction wrong; being unanimously of opinion, that the evidence was defective, in not sufficiently proving that the note was bad. No opinion was given whether this would have been an indictable fraud, if the evidence had been sufficient. (*m*)

Airey's case. Where a carrier pretended to a consignor of goods that he had delivered them to the consignee, and thereby obtained money for the carriage, it was holden that the offence was within the 30 Geo. 2. c. 24. now repealed.

Coleman's case. Pretence of being sent by a neighbour to borrow money.

In a case where the defendant was charged in an indictment that he, being a common carrier, had received goods to carry and deliver at a certain place; and that afterwards contriving and intending to cheat the consignor of his money, he pretended to him that he had carried and delivered the goods to the consignee, and that the consignee had given to him (the said carrier) a receipt expressing the delivery of the goods; but that he had lost, or mislaid, the receipt; and then demanded sixteen shillings for the carriage of the goods, and by means of such false pretences, (which were expressly stated to be false) obtained the sum of sixteen shillings from the consignor, it was holden that the offence was sufficiently brought within the words and meaning of the statute. (*n*)

Where the prisoner went to a tradesman's house, and said she came from a Mrs. Cook, a neighbour, who would be much obliged if he would let her have half-a-guinea's worth of silver, and that she would send the half-guinea presently; upon which she obtained the silver, went away with it, and never returned; the case was holden not to amount to felony. (*o*) And it is said that, in truth, this was a loan of the silver, upon the faith that the amount would be repaid at another time; it was money obtained by a *false pretence*; and that the same determination has been made in similar cases at the Old Bailey. (*p*)

Fraudulently obtaining goods by giving in payment a cheque upon a banker with whom the

We have seen, that it was holden that an indictment for a cheat or fraud at common law could not be supported against a person for delivering a draft on a banker, which he knew he had no authority to draw, and would not be paid, and thereby obtaining certain lottery tickets. (*q*) But a different doctrine appears to

(*m*) *Rex v. Flint*, December 1821, Russ. & Ry. 460.

(*n*) *Rex v. Airey*, 2 East. R. 30.

(*o*) *Coleman's case*, O. B. 1785. 2 East. P. C. c. 16. s. 104. p. 672. 1

Leach 303, note (*a*).

(*p*) 2 East. P. C. c. 16. s. 104. p. 673.

(*q*) *Rex v. Lara*, *ante*, 294.

have been laid down in a case of an indictment on the repealed statute 30 Geo. 2. c. 24. The prosecutor was a jeweller at Cheltenham, who was defrauded of goods to a considerable value by the defendants. Among other things, for the purpose of deceiving him, they gave him in payment for the goods a cheque upon certain bankers in London, with whom it was proved they kept no cash, and had no account. It was contended on behalf of the defendants, that as far as the cheque was concerned, they were not criminally liable. But Bayley, J., is reported to have said, "This point has recently been before the Judges; and they were all of opinion, that it is an indictable offence, fraudulently to obtain goods by giving in payment a cheque upon a banker with whom the party keeps no cash, and which he knows will not be paid." And the defendants were convicted and sentenced to seven years' transportation. (r)

It was said, that though a man cannot be guilty of forgery, merely by passing himself off for the person whose real signature appears to a written instrument, although for the purpose of fraud, and in concert with such real person, there being no false making, yet that this appeared to be a false pretence within the statute 30 Geo. 2. c. 24. (s)

Several points were ruled in a modern case, upon the same repealed statute 30 Geo. 2. c. 24. The indictment charged that the defendant having in his custody and possession a certain parcel, to be by him delivered to Maria, countess dowager of Ilchester, upon the delivery of which he was authorised and directed to receive and take the sum of six shillings and sixpence and no more, for the carriage and portorage of the same; yet that defendant produced and delivered to Thomas Harris, then being servant to the said Countess of Ilchester, the said parcel, together with a certain false and counterfeit ticket, made to denote that the sum of nine shillings and tenpence was charged for the carriage and portorage of the said parcel, and unlawfully, knowingly, and designedly, did falsely pretend to the said Thomas Harris, that the said false and counterfeit ticket was a just and true ticket, and that the said sum of nine shillings and tenpence had been charged, and was due and payable, for the carriage and portorage of the said parcel; and that defendant was authorised and directed to receive and take the said sum of nine shillings and tenpence for the carriage and portorage of the said parcel: by means of which said false pretences, defendant did unlawfully, knowingly, and designedly obtain of and from the said Thomas Harris the sum of three shillings and fourpence in monies, of the monies of the said Countess, with intent to cheat and de-

party keeps no cash, and which he knows will not be paid.

Rex v. Douglass. Upon an indictment on the repealed statute 30 Geo. 2. c. 24. it was holden that where the defendant, a porter, delivered along with a basket of fish a false ticket, denoting that 9s. 10d. instead of 6s. 6d. was to be paid for it, the basket was well described in the indictment as a parcel; but that it would have been otherwise, if the indictment had been on a public local act, 39 Geo. 3. c. 58. which

(r) *Rex v. Jackson* and another, *cor. Bayley, J., Gloucester Lent Ass.* 1813. 3 Campb. 370. And see *Lockett's case*, 1772. 1 Leach 94. 6 T.R. 567, note (c). 2 East. P. C. c. 19. s. 38. p. 940. where upon an indictment for forging an order for payment of money, being in truth a draft upon a banker drawn in the name of a ficti-

tious person, the Judges held that it was immaterial whether such person existed or not, it being sufficient that the order on the face of it imported a right, on the part of the drawer, to direct such a transfer of his property.

(s) 2 East. P. C. c. 19. s. 5. p. 856.

enumerates
baskets, pack-
ages, *parcels*,
&c. specifi-
cally.

Where an indictment on the 30 Geo. 2. c. 24. averred that the defendant, by false pretences, obtained a sum of money, being the proper monies of A. and it appeared in evidence that the money was obtained from B. acting as A.'s servant who had not at that time in his possession any money belonging to A. but afterwards was repaid by him the sum delivered to the defendant, the variance was considered fatal: but the objection was removed upon its appearing

fraud her of the same: whereas in truth and in fact, &c. The delivering the parcel mentioned in the indictment, and receiving nine shillings and tenpence, instead of that which he ought to have received, namely, six shillings and sixpence, was sufficiently brought home to the defendant. But it appeared that the parcel was a *basket* of fish: upon which it was contended on behalf of the prisoner, in the first place, that the indictment was not upon the statute 30 Geo. 2. c. 24. but upon a public local act, the 39 Geo. 3. c. 58. (t) by which it is enacted, that if any porter, or other person employed in the portage or delivery of the "boxes," "baskets, packages, *parcels*, trusses, game, or other things," mentioned in the act, shall demand or receive in respect of such portage or delivery, any greater sum or sums, than the rates or prices thereinbefore fixed, such person shall for every such offence forfeit not exceeding twenty, nor less than five shillings; and that, being upon such act, the *basket* in question was not properly described as a *parcel*, that parcel was not a generic name, and that the indictment should have described the thing according to the fact. (u) Lord Ellenborough, C. J., was of opinion, that if the indictment had been upon the statute cited of the 39 Geo. 3. this would have been a fatal variance; but that, as the indictment was upon the 30 Geo. 2. c. 24. a basket answered the general description of a parcel well enough. In the next place it was objected that as the nine shillings and tenpence were paid to the defendant by the servant of the Countess of Ilchester, the indictment had improperly averred that the monies obtained by the defendant, namely, the three shillings and fourpence, were "the monies of the countess," though she had afterwards repaid the servant the whole sum of nine shillings and tenpence; that in fact the three shillings and fourpence never had been her's, and whether or not she was bound to reimburse her servant, this particular sum of three shillings and fourpence was at the instant the sole property of the servant. And upon this point Lord Ellenborough held, that the subsequent allowance by the countess of Ilchester did not make the money paid to the defendant her property at the time, that she was not chargeable for more than was actually due for the carriage of the basket, and that it depended upon herself whether she should pay the overplus. But the servant afterwards stated, that at the time of this transaction he had in his hands upwards of nine shillings and tenpence, the property of his mistress, which Lord Ellenborough considered sufficient to sustain the averment. In the last place it was objected, that as the offence certainly came within the 39 Geo. 3. c. 58. the defendant ought to have prosecuted on that statute: but Lord Ellenborough said, that the remedy given by that statute was cumulative, and did not take away the remedies which before existed either at common law, or by other acts of parliament. (x)

(t) Entitled "an act for regulating the rates of portage to be taken by innkeepers, and other persons within the cities of London and Westminster, the borough of South-

"wark, and places adjacent."

(u) See as to this objection, Cook's case, 1 Leach. 105. 2 East. P. C. 616.

(x) Rex v. Douglas, cor. Lord Ellenborough, C. J., 1808. 1 Campb.

By reference to the decisions upon the repealed statute 30 G. 2. c. 24. it seems to be clear that the indictment upon the recent statute 7 & 8 G. 4. c. 29. should state what the false pretences are. (y) They should be set out, in order that the court may see what they are, and whether they come within the statute. (z) But it does not appear to be necessary to describe them more particularly than they were shewn or described to the party at the time; and, in consequence of which, he was imposed upon: and it does not seem to be necessary to make any express allegation that the facts set forth shew a false pretence. (a) In a case upon the repealed statute where it was assigned for error that it was no where alleged in the indictment that the defendant "did *falsely* pretend," the judgment was nevertheless affirmed. The indictment alleged, in substance, that the defendant unlawfully, knowingly, and designedly, pretended certain things, "by means of" which said *false pretences* he obtained the money; and, in the subsequent part of the indictment, all the pretences were averred to be false: and the court held this to be sufficient. And it seems also to have been their opinion, that the indictment would have been good if it had only alleged that the defendant obtained the money by such and such pretences, (stating them;) and then averred that those pretences were false. (b) But a special averment, that the pretences, or some of them, are false cannot be dispensed with; and, in a case upon the repealed statute, where it was omitted, and an exception taken on a writ of error, the judgment was reversed. The court considered the case by analogy to the necessary averments in an indictment for perjury, framed under the stat. 23 Geo. 2. c. 11., (c) and were decidedly of opinion that, where a party was charged with obtaining money, &c. by false pretences, and the matter charged as the pretence, contained more than one proposition, the indictment ought to announce the precise charge by distinct averments, and state in what particular such pretences are false. Lord Ellenborough, C. J., said, "To state merely the whole of the false pretence, is "to state a matter generally combined of some truth as well as "falsehood. It hardly ever happens that it is unaccompanied "with some truth. Suppose the offence, instead of being com- "prized within five or six separate matters of pretence, as here, "had branched out into twenty or thirty, of which some might "be true, and used only as the vehicle of the falsity; are we to "understand from this form of charge that it indicates the whole "to be false, and that the defendant is to prepare to defend him- "self against the whole? That would be contrary to the plain "sense of the proceeding, which requires that the falsification "should be applied to the particular thing to be falsified, and not

that B. had at the time in his possession a sum belonging to A. equal to that delivered to the defendant.

The local statute 39 Geo. 3. c. 58. only gives a cumulative remedy.

As to the statement of the false pretences in the indictment.

212. But *quæ* whether the offence charged in the indictment is within the 39 Geo. III. c. 58. It certainly is not within the section cited, which relates only to an overcharge for the *portage*.

(y) *Rex v. Mason*, 2 T. R. 581.

(z) *Fuller's case*, 2 East P. C. c. 18.

s. 13. p. 837.

(a) 2 East. P. C. c. 18. s. 13. p. 837, 838. *Terry's case*, Cro. Car. 564.

(b) *Rex v. Airey*, 2 East. R. 30. *ante*, 306.

(c) *Post*. Book V. Chap. on *Perjury*.

“to the whole. And the convenience also of mankind demands, and, in furtherance of that convenience, it is part of the duty of those who administer justice to require that the charge should be specific, in order to give notice to the party of what he is to come prepared to defend; and, to prevent his being distracted amidst the confusion of a multifarious and complicated transaction, parts of which only are meant to be impeached for falsehood. The legislature have expounded their understanding of the matter in the case of perjury; and I am at a loss to discover why, in reason, in justice, and in mercy to the party, the charge in this case should not be as distinctly ascertained by proper averments that specifically draw his attention to it, as in the case of perjury.” (c) It appears from this case that it is not necessary that the whole of what is stated in order to obtain the property should be false: it is sufficient if part is false; provided that part has a material effect in inducing the party defrauded to give up his property. (d)

As to the certainty with which a false pretence should be stated.

In a case which has been previously mentioned, on another point, (e) an objection was taken that the pretence was not stated with sufficient *certainty*, inasmuch as a wager therein mentioned was stated only to have been made “with a colonel in the army then at Bath,” without setting forth the colonel’s name. (f) But the objection was overruled; and Lord Kenyon, C. J. said, that the charge was sufficiently certain to enable the defendants to know what they were called upon to answer for; and that perhaps the colonel’s name with whom the wager was stated to have been made was not mentioned; in which case he could not have been described with greater accuracy. And further, that if such a wager had been actually depending, it was competent to the defendants to have proved it in their defence.

Several defendants may be charged jointly in the same indictment, if they were all present, and taking part in the transaction.

In the same case it was also holden, that several defendants might be charged jointly in the same indictment, if they were all present and in concert together, taking part in the same transaction. And it was holden also to be no objection in arrest of judgment, that the indictment contained several charges of the same nature in the different counts. Lord Kenyon, C. J. said, “This objection would be well founded if the legal judgment on each count was different; it would be like a misjoinder in civil actions. But, in this case, the judgment on all the counts is precisely the same; a misdemeanor is charged in each. Most probably the charges were meant to meet the same facts; but, if it were not so, I think they may be joined in the same indictment.”

In general on an indictment against two, charging them with a joint offence, either may be found guilty. But they cannot be found guilty separately of separate parts of the charge: yet if they be found guilty separately, upon a pardon or *nolle prosequi* as to the one who stands second upon the verdict, judgment may be given against the other. Hempstead and Hudson were indicted

(c) *Rex v. Perrott*, 1814. 2 M. & S. 379, 386. 298, *et seq.*

(d) And see *Rex v. Hill*, *post* 311.

(e) *Rex v. Young and Others*, *ante*,

(f) See the abstract of the indictment, *ante*, 298, 299.

for stealing in the dwelling-house value 6*l.* 10*s.*, and the jury found Hempstead guilty as to part of the articles value 6*l.*, and Hudson guilty as to the residue. On case, the Judges held, that judgment could not be given against both, but that upon a pardon or *nolle prosequi* as to Hudson, it might be given against Hempstead. (g)

Upon an indictment for obtaining money by false pretences, the pretences which, as we have seen, must be distinctly set out, (h) must at the trial be proved as laid: so that, where the indictment stated that the defendant pretended *that he had paid a sum of money into the Bank of England*, and it appeared upon the evidence that he did not say that *he paid* the money, but that he said generally that *the money had been paid* into the bank, Lord Ellenborough, C. J. held this to be a fatal variance; and said, that an assertion that money had been paid into the bank was very different from an assertion that it had been paid into the bank by a particular individual. (i) But it is not necessary to prove the whole of the pretence charged: proof of part of such pretence, and that the money was obtained by such part is sufficient. An indictment on the repealed stat. 30 Geo. 2. charged the prisoner with obtaining money under colour of obtaining a pension for a discharged seaman, by falsely pretending that the prisoner had received an answer by letter in reply to an application he had made on the seaman's behalf, that two guineas must be sent to the under clerks as fees, *which they always expected, and that nothing could be done without it*. There was no evidence that the prisoner used that part of the pretence in italics, but there was evidence that he used the residue, and by means thereof obtained the money: and on point saved, the Court held it not necessary that the whole of the pretence charged should have been proved, and that the conviction was right. (k)

The pretences must be proved as laid.

In cases where goods had been obtained from another by mere fraud, the court had formerly no power of awarding restitution on conviction of the offender, as in cases of felony; (l) though the obtaining goods by false pretences did not in general change the property in the goods. (m) But the statute 7 & 8 Geo. 4. c. 29. s. 57., in order to encourage the prosecution of offenders, enacts, "That if any person, guilty of any such felony or misdemeanor as aforesaid, in stealing, taking, obtaining, or converting, or in knowingly receiving any chattel, money, valuable security, or other property whatever, shall be indicted for any such offence, by or on the behalf of the owner of the property, or his executor or administrator, and convicted thereof, in such case the property shall be restored to the owner or his representative; and the Court, before whom any such person shall be so convicted, shall have power to award from time to time writs of restitution for the said property, or to order the restitution

Restitution by the Court of goods obtained by false pretences.

(g) *Rex v. Hempstead*, Mich. T. 1817, MS. Bayley, J., and Russ. & Ry. 344.

(h) *Ante*, 309.

(i) *Rex v. Plestow*, cor. Lord Ellenborough, C. J., 1808. 1 Campb. 494.

(k) *Rex v. Hill*, East. T. 1811, MS. Bayley, J., and Russ. & Ry. 190.

(l) *Parker v. Patrick*, 5 T. R. 175.; and *Rex v. De Veaux and Others*, 2 Leach. 585.

(m) *Noble v. Adams*, 7 Taunt. 59.

“thereof in a summary manner : Provided always, that if it shall appear before any award or order made, that any valuable security shall have been *bond fide* paid or discharged by some person or body corporate liable to the payment thereof, or being a negotiable instrument shall have been *bond fide* taken or received by transfer or delivery, by some person or body corporate, for a just and valuable consideration, without any notice, or without any reasonable cause to suspect that the same had by any felony or misdemeanor been stolen, taken, obtained, or converted as aforesaid, in such case the Court shall not award or order the restitution of such security.”

SECTION III.

Of Cheats and Frauds Punishable by other Statutes.

The few statutes by which, in addition to those which have been already mentioned, cheats and frauds are subjected to punishment, will be mentioned according to the order of the time at which they were passed.

13 Eliz. c. 5.
For the avoiding fraudulent conveyances, judgments, &c.,

Enacts, that they shall be void :

And that the parties to them shall incur a forfeiture of a year's value of the lands, &c. ; and suffer imprisonment for one half year.

The statute 13 Eliz. c. 5. intituled, “An Act against Fraudulent Deeds, Gifts, Alienations, &c.” recites, “that feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments, and executions, had been and were devised and contrived of malice, fraud, covin, collusion, or guile ; to the end, purpose, and intent to delay, hinder, or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries, and reliefs ;” and then enacts, in the first place, that “All and every feoffment, gift, grant, alienation, bargain, and conveyance of lands, tenements, hereditaments, goods and chattels, or any of them, or of any lease, rent, common, or other profit or charge out of the same lands, tenements, hereditaments, goods and chattels, or any of them, by writing or otherwise, and all and every bond, writ, judgment, and execution shall be deemed and taken ;” (only as against that person, his heirs, executors, assigns, &c., whose actions, suits, &c. by such fraudulent devices and practices, as aforesaid, shall or might be in any ways disturbed, delayed, or defrauded,) “to be clearly and utterly void.” The third section then enacts, “That all and every the parties to such feigned, covinous, or fraudulent feoffment, gift, grant, alienation, bargain, conveyance, bonds, suits, judgments, executions, and other things before expressed, and being privy and knowing of the same, or any of them ; which shall wittingly and willingly put in ure, avow, maintain, justify, or defend the same, or any of them, as true, simple, and done, had or made *bond fide*, and upon good consideration ; or shall alien, or assign

“ any the lands, tenements, goods, leases, or other things before mentioned, to him or them conveyed as is aforesaid, or any part thereof; shall incur the penalty and forfeiture of one year’s value of the said lands, tenements, and hereditaments, leases, rents, commons, or other profits, of or out of the same; and the whole value of the said goods and chattels; and also so much money as are or shall be contained in any such covinous and feigned bond;” one moiety to the crown, the other to the party grieved, to be recovered in any of the Queen’s courts of record, by action, &c.: “ and also being thereof lawfully convicted, shall suffer imprisonment for one half year, without bail or mainprise.”

The statute 27 Eliz. c. 4. recites, that subjects and corporations, “ After conveyances and purchases of lands, tenements, leases, estates, and hereditaments, for money, or other good considerations, may have, incur and receive great loss and prejudice by reason of fraudulent and covinous conveyances, estates, gifts, grants, charges, and limitations of uses heretofore made or hereafter to be made of in or out of lands, tenements, or hereditaments so purchased or to be purchased; which said gifts, grants, charges, estates, uses, and conveyances were, or hereafter shall be, meant and intended by the parties that so make the same to be fraudulent and covinous, of purpose and intent to deceive such as have purchased, or shall purchase, the same; or else, by the secret intent of the parties, the same to be to their own proper use, and at their free disposition, coloured nevertheless by a feigned countenance, and shew of words and sentences, as though the same were made *bond fide*, for good causes, and upon just and lawful considerations.” The second section then enacts, “ That all and every conveyance, grant, charge, lease, estate, incumbrance, and limitation of use or uses of in or out of any lands, tenements, or other hereditaments whatsoever, had or made for the intent and of purpose to deceive and deceive such person or persons, bodies politic or corporate, as have purchased or shall afterwards purchase in fee-simple, fee tail, for life, lives or years, the same lands, tenements and hereditaments, or any part or parcel thereof, so formerly conveyed, granted, leased, charged, incumbered, or limited in use, or to defraud and deceive such as have or shall purchase any rent, profit or commodity in or out of the same, or any part thereof, shall be deemed and taken” (only as against that person, body politic, &c. their heirs, successors, executors, &c. and persons lawfully claiming under them, which so purchase for money or other good consideration, the same lands, &c.) “ to be utterly void.” And the third section enacts, “ That all and every the parties to such fained, covinous, and fraudulent gifts, grants, leases, charges or conveyances before expressed, or being privy and knowing of the same or any of them, which shall wittingly and willingly put in ure, avow, maintain, justify or defend the same or any of them as true, simple, and done, had or made, *bond fide*, or upon good consideration, to the disturbance or hindrance of the said purchaser or purchasers, lessees or grantees, or of or to the disturbance

27 Eliz. c. 4. recites the mischief of fraudulent and covinous conveyances, &c.,

And enacts, that fraudulent conveyances made to deceive purchasers shall be void:

And that the parties to such conveyances, who avow the same, shall incur the forfeiture of a year’s value of the lands, &c. and suffer imprisonment for one half year.

"or hindrance of their heirs, successors, executors, administrators, or assigns, or such as have or shall lawfully claim any thing by, from, or under them or any of them, shall incur the penalty and forfeiture of one year's value of the said lands, tenements, and hereditaments, so purchased or charged;" (the one moiety to the crown, and the moiety to the party grieved, to be recovered in any of the queen's courts of record, by action, &c.) "And also, being thereof lawfully convicted, shall suffer imprisonment for one half year without bail or mainprize."

9 Ann. c. 14. and other statutes relating to gaming.

The statutes relating to those cheats which are effected by means of cards, dice, and other kinds of *gaming* (and particularly the statute 9 Anne, c. 14.), have been mentioned in a former part of this treatise. (n)

9 Geo. 2. c. 5. s. 4. Persons pretending to exercise witchcraft, &c. tell fortunes, &c. and being convicted, are to be imprisoned for a year: and may be obliged to give sureties for good behaviour.

The statute 9 Geo. 2. c. 5. repeals certain acts relating to conjuration, witchcraft, &c., and then, for the more effectual preventing and punishing of *any pretences* to any acts or powers of witchcraft, sorcery, enchantment, or conjuration, whereby ignorant persons are frequently deluded and defrauded; enacts, "That if any person shall pretend to exercise or use any kind of witchcraft, sorcery, enchantment, or conjuration, or undertake to tell fortunes, or pretend from his or her skill or knowledge in any occult or crafty science to discover where or in what manner any goods or chattels, supposed to have been stolen or lost, may be found; every person so offending, being thereof lawfully convicted (on indictment or information in *England*, or on indictment or libel in *Scotland*), shall, for every such offence, suffer imprisonment by the space of one whole year without bail or mainprize, and once in every quarter of the said year in some market town of the proper county upon the market day, there stand openly on the pillory by the space of one hour, (o) and also shall (if the court by which such judgment shall be given shall think fit) be obliged to give sureties for his or her good behaviour, in such sum and for such time as the said court shall judge proper according to the circumstances of the offence, and in such case shall be further imprisoned until such sureties shall be given." (p)

32 Geo. 3. c. 56. offences relating to the giving of false characters to servants made punishable by a penalty on conviction before two justices.

The statute 32 Geo. 3. c. 56. entitled, "An act for preventing the counterfeiting of certificates of the characters of servants," after reciting the great and increasing evil occasioned by false and counterfeit characters of servants being given either personally, or in writing, by evil disposed persons, enacts, that any person falsely personating any master or mistress, or the executor, administrator, wife, relation, housekeeper, steward, agent, or servant, of a master or mistress, and, either personally or in writing, giving a false character to a servant; or pretending, or falsely asserting in writing, that a servant had been hired for a period of time, or in a station, or was discharged at any other time, or had not been hired in any previous service, contrary to truth; and any person offering himself or herself as a servant, pretending to

(n) *Ante*, Vol. I. p. 304, 406.

(o) 9 Geo. 2. c. 5. s. 4.

(p) As to the abolition of the pu-

nishment of the pillory, except in cases of perjury, &c. see 56 Geo. 3. c. 138.

have served where he or she has not served, or with a false certificate of character, or who shall alter such certificate; and any person who having before been in service shall pretend not to have been in any previous service; shall, on conviction before two justices, forfeit the sum of twenty pounds. (q)

The statute 56 Geo. 3. c. 63. which was passed for regulating the general penitentiary for convicts at *Millbank*, in the county of *Middlesex*, enacts by s. 12., that if the committee (appointed by the act) shall suspect any fraudulent or improper charges in any accounts of the governor, or other officer or servant, or any omission therein, they may examine on oath, &c.; and in case there shall appear any false entry, knowingly made, or any fraudulent omission, or other fraud or collusion, they may dismiss the officer, &c. and cause an indictment to be preferred against them at the next quarter or other general session of the peace for the county wherein the penitentiary is situated, or any other adjoining county, and that in case the person indicted be found guilty of such offence, he shall be punished by fine and imprisonment at the discretion of the Court.

56 Geo. 3. c. 63. s. 12. Officers or servants of the Penitentiary, at *Millbank*, making any false entry or fraudulent omission in their accounts, or other fraud or collusion, may be indicted and punished by fine and imprisonment.

By the *Insolvent Debtors' Act*, 1 Geo. 4. c. 119. s. 33. it is enacted "That in case any prisoner shall, with intent to defraud his creditor or creditors, wilfully and fraudulently omit in his schedule, as finally amended and filed in the said Court, at the time of the order for his discharge from such actual custody as aforesaid any effects or property whatsoever, or retain or except out of the schedule, as wearing apparel, bedding, working tools and implements, and other necessities, more in value than twenty pounds, every such person so offending, and any person aiding and assisting him to do the same, shall, upon being thereof convicted by due course of law, be adjudged guilty of a misdemeanor;" and the Court may sentence such offender to be imprisoned and kept to hard labour for any period of time not exceeding three years. By the 3 Geo. 4. c. 123. s. 24. in any information or indictment for such offences, it is sufficient to set forth the substance of the offence charged on the defendant, without setting forth the petition, or conveyance or assignment to the provisional assignee, appointment of assignee or assignees, or any assignment whatever, or balance sheet, order for hearing, adjudication, order for discharge or remand, or any warrant, rule, order, or proceeding of or in the said Court, except so much of his schedule as may be necessary for that purpose. (r)

1 Geo. 4. c. 119. s. 33. Fraudulent omission in the schedule of an insolvent debtor.

(q) See the different sections of the statute, the substance of which only is here given. The statute provides also that the informer may be a witness, and indemnifies offenders discovering accomplices before information. It also gives a form of conviction, provides for the recovery of the penalties, and gives an appeal to the quarter sessions. An abstract of the statute is given in 5 Burn. Just. *Servants*, sect. 11. In 8 Ev. Col. Stat. Pt. vi. Cl. xxxi. No. 12. p. 909. note

(1), the learned editor says, that a case which he had lately known to occur, is not within the provisions of the act, although attended with all the mischiefs intended to be provided against by it; viz. the case of assuming the name of another person who has been a servant in the same place with the offender. As to the civil consequences of knowingly giving a false character, see 1 Black. Com. 492. note (13).

(r) The 3 Geo. 4. c. 123. s. 31. con-

Mutiny acts.

The annual mutiny acts usually contain clauses providing for the punishment of apprentices and other persons fraudulently enlisting themselves. (s)

Cheats and frauds and false personation, for the purpose of obtaining the pay, prize-money, &c. of soldiers or sailors mentioned in subsequent Chapters. (t)

Cheats and frauds in particular trades.

In addition to the statutes which have been thus mentioned there are others relating to cheats or frauds practised by servants and others, in particular trades, and punishable by pecuniary fines or summary proceedings, before magistrates, which will be found arranged under their proper titles in that very excellent work, "Dr. Burn's Justice of the Peace."

tains a similar provision as to an indictment, &c. against an insolvent debtor in *Ireland*.

(s) As to similar offences by persons enlisting into the *marine* forces, see the annual acts relating to those forces. We have seen that it was a cheat or fraud at common law for an

apprentice to enlist as a soldier, and obtain the King's bounty. Jones's case, *ante*, 289. And see 3 Burn. Just., *Military Law*.

(t) See *post* Chap. xxxiii. On the *Forgery of Official Papers, &c.*; and Chap. xxxv. On *False Personation*.

CHAPTER THE THIRTY-SECOND.

OF FORGERY.

FORGERY at common law has been defined as "the fraudulent making or alteration of a writing to the prejudice of another man's right;" (a) or, more recently, as "a false making, a making *malo animo*, of any written instrument, for the purpose of fraud and deceit:" (b) the word "making" in this last definition being considered as including every alteration of, or addition to, a true instrument. (c) Besides the offence of forgery at common law, which is of the degree only of misdemeanor, there are a great many kinds of forgery, especially subjected to punishment by the enactments of a variety of statutes, which many years ago were spoken of as so multiplied as almost to have become general. (d)

Definition of
the offence.

These statutes, which, for the most part, make the forgeries, to which they relate, capital offences, will be mentioned in subsequent Chapters. At present it will be attempted briefly to review the doctrine of forgery at common law, together with such principles and decided points as (though some of them may have arisen in prosecutions upon particular statutes) appear to be of general application. And, pursuing the order of the definitions above given, we may consider, I. Of the *making or alteration* of a written instrument necessary to constitute forgery; II. Of the *written instruments* in respect of which forgery may be committed; and III. Of the *fraud and deceit* to the prejudice of another's right. We may then briefly treat, IV. Of *principals and accessories*; and V. Of the *indictment, trial, evidence, and punishment*.

In the first place, however, it should be observed that the offence of forgery may be complete, though there be no publica-

A publication
or uttering of
the forged in-

(a) 4 Black. Com. 247.

(b) 2 East. P. C. c. 19. s. 1. p. 852.
Rex v. Parkes and Brown, 2 Leach
785. 2 East. P. C. c. 19. s. 49. p.
965.

(c) *Id. Ibid.* As to the word *forge*,
it is said in 3 Inst. 169. "To forge
is metaphorically taken from the

smith, who beateth upon his anvil,
and forgeth what fashion or shape he
will: the offence is called *crimen
falsi*, and the offender *falsarius*; and
the Latin word to forge is *falsare*, or
fabricare."

(d) 4 Black. Com. 248.

strument, is not necessary to complete the offence of forgery.

tion or uttering of the forged instrument. For the very making with a fraudulent intention, and without lawful authority, of any instrument which, at common law, or by statute, is the subject of forgery, is of itself a sufficient completion of the offence before publication; and though the publication of the instrument be the medium by which the intent is usually made manifest, yet it may be proved as plainly by other evidence. (e) Thus, in a case where the note, which the prisoner was charged with having forged, was never published, but was found in his possession at the time he was apprehended, no objection was taken to the conviction, on the ground of the note never having been published, there being in the case circumstances sufficient to warrant the jury in finding a fraudulent intention. (f) At the present time most of the statutes which relate to forgery make the publication of the forged instrument, with knowledge of the fact, a substantive offence.

SECTION I.

Of the Making or Alteration of a Written Instrument necessary to Constitute Forgery.

Of the making or alteration of a written instrument necessary to constitute forgery.

Not only the fabrication and false making of the whole of a written instrument, but a fraudulent insertion, alteration, or erasure, even of a letter, in any material part of a true instrument, whereby a new operation is given to it, will amount to forgery; and this, although it be afterwards executed by another person ignorant of the deceit. (g) And the fraudulent application of a true signature to a false instrument, for which it was not intended, or *vice versa*, will also be forgery. (h) Thus it is forgery in a man who is ordered to draw a will for a sick person, to insert legacies in it of his own head. (i) So if a man insert in an indictment the names of those against whom, in truth, it was not found; (k) Or, if, finding another name at the bottom of a letter, at a considerable distance from the other writing, he cause the letter to be cut off, and a general release to be written above the name, and then take off the seal, and fix it under the release. (l) And in a late case it

(e) 2 East. P. C. c. 19. s. 4. p. 855.

(f) Elliott's case, 1777, 1 Leach 173. 2 East. P. C. c. 19. s. 44. p. 951. 2 New R. 93. note (a). And see also Crocker's case, Russ. & Ry. 97. 2 Leach 987. where it appears to have been holden by Le Blanc, J., that though the note there in question had been kept in the prisoner's possession, and never attempted to be uttered by him; yet it was a question for the jury under all the circumstances of

the case, whether the note had been made innocently, or with an intent to defraud.

(g) 2 East. P. C. c. 19. s. 4. p. 855.

(h) *Id. ibid.*

(i) Noy. 101. Moor 759, 760. 3 Inst. 170. 1 Hawk. P. C. c. 70. s. 2. 3 Bac. Ab. *Forg.* (A).

(k) Rex v. Marsh and others, 3 Mod. 66. 1 Hawk. P. C. c. 70. s. 2.

(l) 3 Inst. 171. 1 Hawk. P. C. c. 70. s. 2. 3 Bac. Ab. *Forg.* (A).

appears to have been considered that if a party make a copy of a receipt, add to such copy material words, not in the original, and then offer it in evidence on a suggestion of the original being lost, he may be prosecuted for forgery. (*m*) The fraudulent alteration of a material part of a deed is forgery; as the making a lease of the manor of Dale appear to be a lease of the manor of Sale, by changing the letter D. into an S.; or the making a bond for five hundred pounds, expressed in figures, seem to have been made for five thousand: (*n*) and though it seems to have been thought that a deed, so altered, is more properly to be called a false than a forged deed, not being forged in the name of another, nor his seal nor hand counterfeited; (*o*) yet, according to the better opinion, such an alteration amounts to forgery; on the ground that the fraud and villany are the same, as if there were an entire making of a new deed in another's name; and also that a man's hand and seal are falsely made use of to testify his assent to an instrument, which, after such an alteration, is no more his deed than a stranger's. (*p*) Altering the date of a bill of exchange after acceptance, and thereby accelerating the time of payment, would come within the same rule. (*q*) And, upon the principle that the false making of any part of a genuine note, which may give it a greater currency, is forgery; it was holden, in a modern case, that where a note of country bankers was made payable at their house in the country, or at their banker's in London, and the London banker had failed, it was forgery to alter the name of such London banker to the name of another London banker, with whom the country bankers had made their notes payable subsequently to the failure. The Judges held that the act done by the prisoner was a false making, in a circumstance material to the value of the note, and its facility of transfer, by making it payable at a solvent instead of an insolvent house. (*r*) And upon the general principle that the alteration of a true instrument makes it, when altered, a forgery of the whole instrument, it was holden that where the indictment charged the prisoner with "making, forging, and counterfeiting" a bill of exchange, and with uttering it, knowing it to be forged; and the evidence was of an alteration of the bill of exchange from 10*l.* to 50*l.* in the part of it in which the sum is expressed in figures, and also in the part in which it is expressed in letters, the prisoner was properly convicted; though the statute, on which the indictment proceeded, 7 Geo. 2. c. 22. contains

(*m*) By Lord Ellenborough, C. J., in *Upfold v. Leit*, 5 Esp. 100. The words inserted were "in full of all demands."

(*n*) Moor 619. 1 Hawk. P. C. c. 70. s. 2. So in *Elsworth's case*, 2 East. P. C. c. 19. s. 58. p. 986., where a cypher being added after the figure 8, the bill, which was for 8*l.*, became a bill for 80*l.*

(*o*) 3 Inst. 169.

(*p*) 1 Hawk. P. C. c. 70. s. 2. 3 Bac. Ab. *Forg.* (A) in the notes.

(*q*) *Master v. Miller*, 4 T. R. 320. 2 East. P. C. c. 19. s. 4. p. 853.

(*r*) *Rex v. Treble*, 2 Taunt. 328, 333. 2 Leach 1040. Russ. & Ry. 164. The alteration was effected by pasting a slip of paper bearing the words Ramsbottom and Co., over the words Bloxam & Co., in the same manner as the prosecutors had themselves altered their re-issuable notes after the failure of their first London bankers, Bloxam & Co.

the word *alter* as well as the word *forge*; "if any person shall falsely make, alter, forge, or counterfeit, or utter, or publish, as true, any false, altered, forged, or counterfeited, &c.;" from which it was contended that to *alter* a bill of exchange was made a distinct offence. (s) So altering a banker's one pound note by substituting the word ten for the word one, was held to be forgery. (t) And discharging one indorsement and inserting another, or making it thereby a general instead of a special indorsement, has been holden to be altering an indorsement. (u)

Expunging an indorsement on a bank note.

The expunging, by means of lemon juice (laid in the indictment to be a certain liquor unknown to the jury,) an indorsement on a bank note, was holden to be a *raising* of the indorsement within the statute 8 & 9 W. 3. c. 29. s. 36., which relates to the altering or raising any indorsement on any bank bill, &c. (x)

Forgery and subsequent alteration of the deed.

In a case where the prisoner procured a deed to be forged, as from one J. M. and his son, conveying a certain estate for life to M. K.; and after the death of one of the supposed grantors, had procured the forged deed to be altered by enlarging the grantee's estate to a fee; and was convicted of forging and uttering it in the state to which it was so altered; this was holden to be well by all the Judges; as being no less a forgery after than before such alteration. (y)

As to forgery by fraudulent omission in a written instrument.

It seems that a man cannot be guilty of forgery by a bare *non feasant*; as if in drawing a will he should omit a legacy which he was directed to insert: but it appears to have been holden that if the omission of a bequest to one cause a material alteration in the limitation of a bequest to another, as where the omission of a devise of an estate for life to one man causes a devise of the same lands to another to pass a present estate, which otherwise would have passed a remainder only, the person making such an omission is guilty of forgery. (z)

Making a false deed in a man's own name.

A man may be guilty of forgery by making a false deed in his own name. Thus it has been holden to be forgery for a person to make a feoffment of certain lands to I. S., and afterwards make a deed of feoffment of the same lands to I. D. of a date prior to that of the feoffment to I. S.; for herein he falsifies the date in order to defraud his own feoffee, by making a second conveyance, which at the time he had no power to make. (a) And it is also said that his crime would have been the same if, by his conveyance, he had passed only an equitable interest for good consideration, and had

(s) Teague's case, *cor.* Le Blanc, J., *Hereford* Sum. Ass. 1802, Mich. T. 1802. 2 East. P. C. c. 19. s. 55. p. 979. Russ. & Ry. 33. The Judges held that the point was governed by Dawson's case, Mich. 3 Geo. 1. 1 Str. 19. 2 East. P. C. c. 19. s. 55. p. 978. where the prisoner having altered the figure of 2 in a bank note to 5 (220L. to 520L.) ten of the Judges agreed that it was forging and counterfeiting a bank note; and that 3 Inst. 171, 172, was not law in this respect; for *non assumpsit* might be pleaded to such a

note.

(t) *Rex v. Post*, East. T. 1806, and Russ. & Ry. 101.

(u) *Rex v. Birkett and Brady*, Russ. & Ry. 251.

(x) *Rex v. Bigg*, 3 P. Wms. 419.

(y) *Kiader's case*, 1800. 2 East. P. C. c. 19. s. 4. p. 855.

(z) *Moor 762*. Noy. 101. 1 Hawk. P. C. c. 70. s. 6. 3 Bac. Ab. *Forg.* (A) 2 East. P. C. c. 19. s. 4. p. 856.

(a) 3 Inst. 169. Pult. 46 b. 1 Hawk. P. C. c. 70. s. 2. 3 Bac. Ab. *Forg.* (A).

afterwards by such a subsequent antedated conveyance endeavoured to avoid it. (b)

If a bill of exchange, payable to A. B. or order, get into the hands of another person of the same name with the payee, and such person, knowing that he is not the real payee, in whose favour it was drawn, indorse it, for the purpose of fraudulently possessing himself of the money, he is guilty of forgery. (c)

The uttering of a note, as the note of another person, has been holden to be forgery, though such note was made in the same name as that of the prisoner.

The point arose in the following case: two prisoners, named Parkes and Brown, were indicted for forging a promissory note, of which the following is a copy.

Rington, Salop, April 20, 1796.

No. B. 248.

I promise to pay to bearer, on demand, at Messrs. Down, Thornton, and Co.'s, bankers, London, the sum of Five Guineas, for value received. For Self and Co.

THOMAS BROWN. (d)

FIVE GUINEAS.

Entered, T. B.

There was a second count for uttering the same, knowing it to be forged. The following facts appeared in evidence: the prisoner, Brown, uttered the note to one Hulls, a shoemaker, in part payment for a quantity of boots and shoes which he had bought, under a pretence that he was a Captain Brown of the 17th regiment, and going immediately to the West Indies. At the time when he bargained for the articles at Hulls's shop, he told Hulls that if he would send his boy with him he would send back the money: but Hulls declined this, and went himself with the prisoner. While on their way, Brown said that his brother was agent to the 17th regiment, and would buy all the shoes Hulls had: and, upon their coming to a public-house, he invited Hulls to go in, saying, he should see his brother presently. They then sat down together, on a bench in the garden of the public-house; and Brown proceeded to speak further of his brother, who, he said, had just married a lady with a fortune of 15,000*l.* and had deposited it in the hands of Down and Thornton. After some time, the brother not appearing, Brown went into the house, and returned again, using expressions of disappointment at the absence of his brother, and added: "I am sorry I cannot pay you in gold: but I can give you what is just as good, one of my brother's drafts, for which I have been into the house to get cash, but the landlord has not enough by him." He then produced the note in question, and gave it to Hulls, who asked if it was on the money lodged with

Indorsing a bill of exchange by a person of the same name as the payee.

Uttering a note made in the same name as that of the prisoner.

Parkes' and Brown's case. Holden to be forgery to utter a note as the note of another, though made in the prisoner's own name.

(b) 1 Hawk. P. C. c. 70. s. 2. 3 the bearer on demand;" and also the words, "the sum of five guineas, for value received for Self and Co." were printed in the note.

Bac. Ab. Forg. (A) in the notes. Moor 665.

(c) Mead v. Young, 4 T. R. 28.

(d) The words, "I promise to pay

Down and Co.'s, Brown said that it was; and added, that his brother and he always paid in that manner on demand, for they wanted no credit. He then appointed Hulls to meet him in the afternoon, at another place, where he would pay him the balance. The note was soon discovered to be a forgery, and Hulls could hear nothing more of Brown. It further appeared, that Parkes and Brown were connected together; and that when Parkes was taken up, more than forty of these five-guinea notes, in blank, were found upon him, dated Ringhton, Salop; and a few of the same sort of notes were also found concealed under a board in a shop where the prisoner Brown was arrested, and which it was probable he had thrust there. The note in question was proved to be filled up in the hand-writing of Parkes; and the name Thomas Brown was also in the hand-writing of Parkes. In Parkes's pocket-book was found a receipt under a cover, addressed to Thomas Brown, at the Compter, (the prison to which Brown had been committed,) for 21*l.*, for four five-guinea bills. It was also proved that Down and Co. had no such customer as Thomas Brown, of Ringhton in Shropshire; and there was no evidence that the prisoner Brown had any residence or connection at that place. Upon this evidence the jury found both the prisoners guilty; and stated that they thought Parkes signed the note in question with Brown's assent, and that Brown uttered it under a representation that it was his brother's, knowing that it was not so, with intent to defraud Hulls. The following objections to the conviction were then taken by the counsel for the prisoner: first, that the name *Thomas Brown* was the real name of one of the prisoners; secondly, that it was no forgery in Parkes to sign the name of Thomas Brown, with his consent; thirdly, that if Parkes were not guilty of forgery, Brown could not be guilty of uttering the note knowing it to be forged; and fourthly, that the subsequent misrepresentation of Brown ought not to affect Parkes, as there was no evidence that he was aware of the fraudulent circumstances under which Brown would utter the note: the principle being, that misrepresentations do not amount to forgery, or make that a forgery which was not so at the time of the original making.

These points were submitted to the consideration of the twelve Judges, who held the conviction wrong as to Parkes, on a ground irrelevant to the subject now under consideration; but all of them held the conviction right as to Brown: and Grose, J., afterwards delivered their opinion. "He observed, as to the first objection, "that the definition of forgery was, 'the false making a note, or "other instrument, with intent to defraud;' (e) which might be "done either by using the name of one who did not exist, or of "one who did exist, without his consent. That this was of the "former description; being uttered by the prisoner as the note "of his brother, no such person as his brother of that name ap- "pearing to exist: and that the circumstance of its being made "in the same name as his own could not make any difference;

“being uttered as the note of another, and not his own. The same answer applied to the second objection. As no such person existed to whom the name of Thomas Brown, *as the signer of the note*, applied, there could be no consent given to sign the name. It was signed by the authority of a Thomas Brown, but not of the Thomas Brown for whose note it purported to be given. For the person in whose name the note was made was, according to the description of him in the note, then a resident at Rington, in Salop; and it imported that he was a correspondent of Down, Thornton, and Co., and had money in their hands; and he was also represented to be the brother of the prisoner; but no such person of that name and description appeared to exist. And all this was proved and found to be done for the purpose of fraud. Thirdly, that the indictment did not charge that Brown uttered the note knowing it to have been forged by Parkes, but only knowing it to have been *forged*; and, therefore, let it have been forged by whomsoever it might, it was equally an offence in Brown to utter it.” (f)

The foregoing case has been observed upon by a learned writer, who says that, though supported by the highest authority, it has always appeared to him to rest upon very questionable principles. (g) And he cites a case, where upon the facts that a bill made by the prisoner D. Walker, (who was a pauper at Manchester) was dated Liverpool, signed D. Walker and Co., and drawn on Devaynes and Co. London; and that similar bills had been before drawn in the same manner, and, being provided for before due, had been regularly paid, although the drawer was unknown to the house; the case in question was cited as an authority: but the learned Judge ruled, that the evidence was not sufficient to go to the jury. (h) And, in discussing the effect of a false representation, he refers to the following case, where the prisoner assumed to be the real indorser of a bill; yet, as there was no false making, it was holden not to be forgery; though the act was done in concert with the real indorser, and for the purpose of fraud. (i)

Doubt suggested upon the preceding case.

The prisoner, John Hevey, was indicted for forging an indorsement on the back of a bill of exchange, in the name of Barnard M'Carty, with intent to defraud Wm. Masters and Edward Beauchamp, &c; and the indictment contained a second count, for uttering and publishing a forged indorsement in the name of Barnard M'Carty, with the like intention. The bill of exchange in question was in the following form:—

Hevey's case. The prisoner assumed to be the real indorser of a bill: but as there was no false making, it was holden

(f) *Rex v. Parkes and Brown*, 1796, 1797. 2 Leach 775. 2 East. P. C. c. 19. s. 49. p. 963. Brown accordingly received sentence of death, but was not executed. 2 Leach 788.

(g) 6 Ev. Col. Stat. Pt. V. Cl. XII. p. 580.

(h) Walker's case, *cor. Chambre, J., Lancaster*, about the year 1807. *Id. Ibid.*

(i) This appears to have been a false pretence within the statute 30 Geo. 2. c. 24. And see now 7 & 8 G. 4. c. 29. *Ante*, 398.

not to be forgery, though the act was done in concert with the real indorser and for the purpose of fraud.

"No. 59.

£30.

"*Bath Bank, Nov. 19th, 1781.*

"Thirty-one days after sight, pay Mr. Barnard M'Carty, or order, thirty pounds value received, for Smith, Moore, and Co.
"Jer. Connell."

"To Rich. Beatty, and Co.

"No. 19, *Great St. Helen's, London.*"

It appeared in evidence, that the prisoner came to the shop of Beauchamp and Masters, who were pawnbrokers, to buy a watch, and offered them the bill in question, with the indorsement then written on it; that they hesitated about taking it, upon which he told them it was a good bill, that his name was Barnard M'Carty, that he had indorsed it, and that Beatty and Co., by whom the bill purported to be accepted, were agents to the Bath bank. The pawnbrokers were not satisfied, and sent their servant to St. Helen's, to inquire about the acceptance; but upon his returning and saying that he had seen a person at St. Helen's, who said the acceptance was good, they let the prisoner have the watch, and gave him the difference of the bill. It was then proved, that the prisoner had procured the plate to be engraved some time before, containing the form of the bill in question, and had printed several hundred copies; that he had always been known by the name of John Hevey; and that no such person as Smith, Moore, and Co. could be found in Bath; though there were such names put on the door of a house, from whence the person who had been there had run away. It was proved also, that the names of Beatty and Co. were on a counting-house door in Great St. Helen's, where a man of the name of Beatty, who said he was a clerk, had lived; but was since taken up and lodged in prison. And it further appeared, that there was such a man as Barnard M'Carty, and that the indorsement was in fact of his hand-writing. Upon this evidence the jury, under the direction of the learned Judge, who tried the prisoner, found a verdict of guilty, and found specially that there was such a person existing as Barnard M'Carty, and that the indorsement was of his hand-writing; that the prisoner was not that person, but had passed himself upon the prosecutors as such at the time he tendered the bill in payment. The case was afterwards submitted to the consideration of the twelve Judges, who were all of opinion, that it did not amount to forgery; for there was no false indorsement; the jury having found that the indorsement was truly made by a real person whose name it purported to be. (*k*)

Webb's case. False description of the acceptor, but not a false name, held not to be forgery.

And in a more recent case it was holden, by a majority of the Judges, upon a case reserved, that the adopting a false description and addition, where a false name was not assumed, and where there was no person answering the description or addition, was not a forgery. The bill of exchange upon which the indictment proceeded, was addressed to Mr. Thomas Bowden, Baize Manufacturer, Romford, Essex; and drawn by the prisoner in his own

(*k*) Hevey's case, *cor.* Ashhurst, J. Judges in Hil. T. 17 s. 1 Leach 229. O. B. 1782, and considered by the 2 East. P. C. c. 19. s. 5. p. 856.

name. It was proved that the prisoner uttered this bill, with an acceptance thereon in the hand-writing of Thomas Bowden, whom the prisoner had known for many years, but who never had carried on the business of a baize-manufacturer at Romford, nor ever resided there. The bill was accepted by Bowden, payable at No. 40, Castle-street, Holborn; and the person who lived at that house, and who knew Bowden, and was well acquainted with his hand-writing, stated that he was surprised at Bowden's accepting the bill, payable at his house, as he did not reside there, and had no authority from the witness to make any bills payable at that house. The learned Judge left it to the jury in the first place to consider, whether there was any such person as Thomas Bowden; and, if there was, whether the acceptance was his: and that if there was no such person, or the acceptance was not his, and the prisoner at the time he offered the bill to the prosecutors knew either that there was no such person, or if there was, that he had not accepted it, they should find him guilty. He also gave them other directions; but the jury found that there was no such person as Thomas Bowden, and the prisoner was convicted. The learned Judge, however, being of opinion, from the evidence, that there was such a person, and that the acceptance was his hand-writing, reserved the case for the opinion of the Judges, on the point whether, assuming that the acceptance was the hand-writing of Bowden, the prisoner, by the giving on the face of the bill a false description of Bowden, and uttering the bill after it was accepted by Bowden, with this false description, with intent to defraud, brought himself within any of the counts of the indictment which charged a forgery of the bill, and an uttering and publishing the forged bill; and also a forging of the acceptance, and the uttering and publishing such forged acceptance. And a majority of the Judges held the conviction wrong. (l)

A bill was addressed to Messrs. Williams and Co., bankers, Birchin-lane, London; and it appeared that possibly the figure 3, on the lower left-hand corner of the bill, might have been inserted originally as part of the address, but the evidence left that matter in doubt. The prisoner was asked at the time when he was drawing the bill, whether the acceptors were Williams, Birch, and Co., and his answers imported that they were. Williams, Birch, and Co. lived at No. 20, Birchin-lane; and it was proved not to have been their acceptance. There were no known bankers in London using the style of Williams and Co. except Williams, Birch, and Co.; but at No. 3, Birchin-lane, the name "Williams and Co." was on the door; and some bills addressed to Messrs. Williams and Co., bankers, *Swansea*, had been accepted payable at No. 3, and had been paid there. There was no evidence as to the person who lived at No. 3; but another bill, of the same tenor as that in question, drawn by the prisoner, had been accepted there. It was holden, upon these facts, that the prisoner was improperly convicted of uttering a forged acceptance, knowing it to be forged. (m)

Watts's case.

The cases in which a party committing forgery has used a

Cases in which
a party com-

(l) *Rex v. Webb*, Russ. & Ry. 405.

(m) *Rex v. Watts*, Russ. & Ry. 436.

mitting forgery has used a name different from his own.

Assuming the name of a person really existing.

Dunn's case. Where a note charged to be forged, though made by the prisoner in an assumed name and character, was her own note made and offered as her own, and not as the note of another in contradistinction to herself, the offence was holden to be forgery.

name different from his own, consist either of those in which the name used has been of a real existing person, or those in which the name used has been of a person non-existing and fictitious.

It is said to be clearly settled, that in the case of forgery committed in the name of a person really existing, it matters not, whether the offender pass himself off upon the parties at the time for such person, and receive credit from them as such; the credit in such case not being given to the impostor personally without any relation to another, but to that other person whom he represents himself to be. (n)

The prisoner, Elizabeth Dunn, was indicted for forging the following promissory note, with intent to defraud Edward Hooper.

London, 27th July, 1765.

I promise to pay to Mr. Edward Hooper, the sum of *three* (the word *pounds* being omitted) thirteen shillings and sixpence, or order, seven days after date value received by me

her
Mary X Wallace.
mark

Witness John Whattal.

The facts were, that in June, 1765, the prisoner applied to Hooper, at his office for receiving seamen's wages, calling herself Mary Wallace, and desired him to advance her money, to pay the fees for the probate of her husband's will, which was in the hands of a proctor. She returned soon after with the probate of the will of John Wallace, therein described to be a seaman on board the *Epreuve*; when Hooper required her to produce a certificate, to shew that she was the Mary Wallace named in the will. A few days afterwards she brought a certificate, and pressed Hooper to lend her money on the credit of the wages due to J. Wallace; when he let her have three guineas and a half, and wrote the body of the promissory note in question, to which she subscribed her mark; after which his clerk attested it. She was then asked what name he was to put to her mark, to which she answered, "You know my name, you may write Mary Wallace;" which he did. It was proved clearly that her name was Elizabeth Dunn, and that the whole account was a fabrication. Upon this evidence, the jury were directed to find the prisoner guilty, if they believed that she subscribed the note produced in a false name, either by a mark intended by her to express such false name, or by words at length, with intent to defraud Hooper; and the jury accordingly found her guilty. Judgment was then respited upon a doubt, whether as the note, though made by the prisoner in an assumed name and character, was her own note, made and offered as her own, and not as the note of another, in contradistinction to herself, the offence amounted to forgery. But upon the case being submitted to the consideration of the Judges, nine of them were of opinion that the prisoner was properly convicted. (o)

(n) 2 East. P. C. c. 19. s. 49. p. 962.

(o) Dunn's case, O. B. 1765, and Mich. T. 1765. 1 Leach 57. 2 East.

P. C. c. 19. s. 49. p. 962. Two of the Judges were absent, and Aston, J. did not concur in the opinion.

This case appears to have proceeded upon the ground of the prisoner having assumed the character of executrix of Wallace, a real person actually entitled to wages. Amongst the principles there laid down, it appears to have been holden, that if a note be given in the name of another person who is either really existing, or represented so to be, and in that light it obtain a superior credit, or induce a trust which would not have been given to the party himself, it is then a false instrument, and punishable as forgery; and that the law would be the same, though the note or security were thus falsely subscribed in the presence of him who lent his money upon it, if the impostor and the party whose name is made use of were both strangers to him; for then he could not know that such impostor was not really the person whose name he assumed, and therefore the other would be equally deceived. (p) But this case occurred before any decision had established the principle, which will be presently noticed, of the use of a mere fictitious name being of itself sufficient to constitute a forgery. (q) And it is observed, that after the authorities by which it was settled, that such a case was within the acts respecting forgery, it would have been quite sufficient to have shewn, that the prisoner with a fraudulent intent, signed a promissory note, in the name of Mary Wallace; and it would have been unnecessary to resort to the additional circumstance of the fraudulent object being to obtain credit in respect of money actually due to the deceased John Wallace, of whom Mary was falsely alleged to be the representative. (r)

In a case where the prisoner was convicted and executed, for forging a bill of exchange, the facts were, that he had appeared in the neighbourhood of the lakes in Cumberland, pretending to be the Hon. Alexander Augustus Hope, brother of the Earl of Hoptoun, and in that name induced a young woman to marry him, and imposed upon several persons in the neighbourhood; and that, during such residence, he drew the bill in question upon a gentleman to whom he was known by that name, and who probably would have paid the bill, if the grand deception had not in the mean time been discovered. It is observed, as a material ingredient in this case, that the prisoner assumed the name and character of a really existing person. (s)

Hadfield's case. Assuming the name and character of an existing person, and drawing a bill of exchange, holden to be forgery.

(p) 2 East. P. C. c. 19. s. 48. p. 961.

(q) Indeed the contrary proposition appears to have been taken for granted, in one report of this case, where, in the opinion of the nine Judges who thought the case amounted to a capital forgery, the following passage occurs. "In this respect the case is very different from that of a person borrowing money upon his own note, and merely assuming a fictitious name, without any relation to a different person; for there the whole credit is given to the party himself; the lender accepts the security, as the security of that per-

"son only; he has no other remedy in view but merely against the man he is dealing with; and the security itself is really and truly the instrument of the party whose act it purports to be, however subscribed by a fictitious name; he has, therefore, a remedy upon it against the person on whose credit he took it, and consequently is not substantially defrauded." Dunn's case, 1 Leach 60.

(r) 6 Ev. Col. Stat. Pt. V. Cl. xii. p. 579.

(s) Hadfield's case, *Carlisle*, 1803. 6 Ev. Col. Stat. Pt. V. Cl. xii. p. 580.

Assuming the name of a non-existing fictitious person.

With respect to the cases in which the name used has been that of a non-existing and fictitious person, it is laid down, as a clear proposition, that the making of any false instrument which is the subject of forgery, with a fraudulent intent, although in the name of a non-existing person, is as much a forgery, as if it had been made in the name of one who was known to exist, and to whom credit was due. (*t*)

Lewis's case. Uttering a forged deed purporting to be a power of attorney from a non-existing person.

In a case where the prisoner was indicted on the statute 2 Geo. 2. c. 25. for uttering a forged deed, purporting to be a power of attorney, from Elizabeth Tingle, administratrix of her father Richard Tingle, deceased, late a marine belonging to his majesty's ship the Hector, to F. Predham, of Bernard's-inn, &c. empowering the said Predham to receive all prize money due to her, &c. the facts were clearly proved, and the prisoner was convicted. But a doubt was entertained, whether as Richard Tingle had died childless, and as there was no such person as Elizabeth Tingle, the case amounted to forgery; and the point was referred to the consideration of the twelve Judges. Eleven of them were very clearly of opinion, that the case was within the letter and meaning of the act. (*u*)

Indorsing a fictitious name on a bill of exchange may be forgery.

A person indorsing a fictitious name on a bill of exchange to give it currency, will be guilty of forgery; and in a case which was stated to the Judges, they were all of opinion, that a bill of exchange drawn in fictitious names, when there are no such persons existing as the bill imports, is a forged bill within the statute 2 Geo. 2. c. 25. (*x*)

Bolland's case. The use of a mere fictitious name is sufficient to constitute forgery.

In the following case, the general proposition, that the use of a mere fictitious name is in itself sufficient to constitute forgery, was first established. (*y*) The prisoner, James Bolland, was indicted for forging an indorsement in the name of James Banks, on the back of a promissory note for £100. drawn by Thomas Bradshaw, and indorsed by Samuel Pritchard; with intent to defraud F. L. Cardeneaux. Another count charged him with uttering the same, knowing, &c. It appeared that the drawer and payee of the note in question were real persons; and that when the note came into the hands of Bolland, he indorsed it in the first instance with his own name, and attempted to negotiate it to one Jesson, with whom he had had money transactions: but that, upon Jesson saying that he should not be able to negotiate the note with Bolland's indorsement on it, he said, he could take his name off. Immediately another person in company began to erase the name. After he had scratched off all but the initial letter B., Bolland said, "Don't scratch it all out; it may disfigure or cancel the note; I will think of some other name that begins with a B.;" and imme-

(*t*) 2 East. P. C. c. 19. s. 46. p. 957.

(*u*) Lewis's (Anne) case, O. B. 1754. Post. 116. It is stated that the doubt arose from the passage in 3 Inst. 169. where Lord Coke, speaking of forgery, says, "this is properly taken when the act is done in the name of another person." But it was thought that Lord Coke's description of the offence, on which the doubt was

grounded, was apparently too narrow. Post. 116, 117.

(*x*) Wilks's case, *Boatman*, 1767. In consequence of this opinion, the prisoner was tried *cor. Yates, J.* but the jury acquitted him. 2 East. P. C. c. 19. s. 46. p. 958.

(*y*) See Dunn's case, *ante*, 326. note (*q*).

diately made the name *Banks*. Jesson then took the note ; and saying that he should be asked who James Banks was, Bolland said, he was a publican of Rathbone-place. Jesson soon afterwards applied to Cardeneaux to discount the note, and obtained from him some money on the credit of it ; and being pressed by Bolland shortly after for the amount of the note, he took him to Cardeneaux, and introduced him as the owner of the note. Cardeneaux inquired who Banks was ; to which Bolland answered that he was a man of property, who dealt largely in wines and spirits, and lived in Rathbone-place. Cardeneaux then gave him the amount of the note, in notes and cash ; and did not ask him to indorse the note, Jesson having before told him, that it was better that Bolland's name should not appear on it, as he had been a sheriff's officer, and the note would not pass properly with his name upon it. It further appeared, that Bradshaw and Pritchard having become bankrupts before the note was payable, Cardeneaux applied to Bolland, when Bolland denied having discounted any note with him, and said, that his name was James Bolland, that he had never seen Cardeneaux before in his life, and that he had no note with his indorsement on it ; and when Cardeneaux insinuated that he was acquainted with his having altered his name, he disregarded it. After the prisoner was taken up, some person paid the £100. to Cardeneaux, in the name of James Banks ; but no such person as James Banks of Rathbone-place appeared to exist. The jury found the prisoner guilty. After conviction and judgment of death, the case was referred to the Judges : and the prisoner was afterwards ordered for execution, and suffered accordingly. (z)

Very shortly afterwards a case occurred in which it was holden that a forged order on a banker, for the payment of money, purporting to be made by one who kept cash with him, was within the statute 7 Geo. 2. c. 22., though made in a fictitious name, or in the name of one who had no authority to draw on him. (a)

It is agreed to be immaterial whether any additional credit be gained by using the false name.

The prisoner, Edward Taft, was tried for forging an indorsement on a bill of exchange, for fifty pounds, in the name of John Williams ; and, having been found guilty, the following case was submitted to the consideration of the twelve Judges. The bill of exchange was drawn payable to the order of Messrs. Renwicke and Mee, by whom it was indorsed generally, and it afterwards became the property of one *William Wheewall*, out of whose pocket it had been picked or lost, with other things, at Leicester races, on the 16th September, 1776. The prisoner had, on the same night, endeavoured to negotiate it at Leicester ; but, being disappointed, he proceeded to Market Harborough, where he bought a horse of the landlord of the inn, and offered him the bill to change. The landlord, not having cash sufficient in the house, carried it to a banker's in the town, where the clerk told him that it was very good paper, for that he knew the payee who had in-

Lockett's case.
A forged order on a bank, in a fictitious name, amounts to forgery.

Taft's case. It is forgery to indorse a bill in a fictitious name, although the money might have been as well obtained by indorsing it in the real name of the person who uttered it. It is immaterial, therefore, whether any additional credit be gained by using the false name.

(z) Bolland's case, O. B. 1772, 1 Leach, 83. 2 East. P. C. c. 19. s. 46. p. 958.
(a) Lockett's case, 1772, 1 Leach, 94. 2 East. P. C. c. 19. s. 38. p. 940. ; and S. P. in Abraham's case, 1774. 2 East. P. C. *ibid.*

dorsed it, and that if he, (the landlord,) would put his name on the back of it, it should be immediately discounted. The landlord, however, not knowing the person from whom he had received it, refused to indorse it; but told the clerk that the gentleman was then at his house, and he would go and fetch him. He accordingly went to the prisoner, who accompanied him to the banker's, where the clerk told the prisoner that it was the rule of their house never to take a discount-bill unless the person offering such bill indorsed it; but that if he would indorse the bill in question, it should be discounted. The prisoner immediately indorsed it by the name of "*John Williams*;" and the banker's clerk, after deducting the discount, gave him the cash for it. The prisoner's name was not *John Williams*. The Judges were unanimously of opinion that this was a forgery within the statute on which the indictment was framed; for, although the fictitious signature was not necessary for the prisoner's obtaining the money, and his intent in writing a false name was probably only done to conceal the hands through which the bill had passed, yet it was a fraud both on the owner of the bill, and on the person who discounted it; as the one lost the chance of tracing his property, and the other lost the benefit of a real indorser, if by accident the prior indorsements should have failed. (b)

Taylor's case. It is forgery to give to the drawee of a bill of exchange a receipt in a false name, as for the prisoner's own name, for the contents of the bill, such bill being indorsed in blank, if it be done fraudulently and to escape detection, although no additional credit be thereby gained to the prisoner.

In a case which occurred shortly afterwards, it was holden that a receipt, indorsed on a bill of exchange in a fictitious name, is a forgery, although it do not purport to be the name of any particular person. The prisoner, Taylor, was indicted for that he having in his possession a bill of exchange, in the words and figures following—

"SIR,

Tamworth, 2d August, 1779.

"One month after date please to pay to my order, the sum of Twenty Pounds, value received, as per advice from

"THOMAS HARPER."

"TO MR. JOSEPH CUFF,
"No. 125, Whitechapel,
"London."

feloniously did make, forge, and counterfeit, a receipt and acquittance, for the said sum of twenty pounds, as followeth, "Recd., "*W. Wilson*;" with intention to defraud the said Joseph Cuff. A second count stated, an uttering with the like intention; and the third and fourth counts were, for forging and uttering it with intent to defraud *John Briggs* and *Henry Sutton*. The facts were, that the bill was indorsed in blank, and delivered to *Sutton*, out of whose possession the prisoner obtained it by some undue means, (which did not appear,) and presented it for payment when it wanted two or three days of becoming due; that he offered to

(b) *Taft's case*, 1777, 1 Leach, 172. 2 East. P. C. c. 19. s. 47. p. 959. The Judges also referred to the case of *Rex v. Lockett*, (*ante*, 329,) as hav-

ing decided that the forging a name either of a real or of a fictitious person, with intent to defraud, was forgery.

give a trifle to adjust the difference, and accordingly gave the drawee, Cuff, a shilling for the discount: that Cuff then desired him to write a receipt on the back of the bill, which he did, by writing the receipt in question, in the fictitious name of Wilson. Upon this evidence, it was submitted to the court that this was not a receipt for money within the meaning of the statute, for that it was essential to the commission of forgery that the act should be done in the name of another; but that, in the present case, for any thing that had appeared to the contrary, there never was such a person existing as the "William Wilson," whose name was supposed to have been forged. It was also submitted, that the name "William Wilson" could not have been used with an *intention to defraud*, because no receipt at all was necessary, nor was the prisoner compellable to give a receipt, and he might as well have procured payment of the bill by writing the receipt in the name of "John Taylor," as in the name of "William Wilson;" the possession of the bill being a sufficient discharge to the drawee. That, therefore, as the discharge to the drawee was not any way strengthened by the receipt the prisoner had given, the use of the fictitious name, which was not necessary to the accomplishment of any fraud, was of no effect. And it was further urged, that the prisoner gained no additional credit by the name he assumed; and that what he had written was a mere memorandum, and did not operate as an acquittance against any person but the man himself who received the money, and who would be equally estopped by it as if he had written his own name. But the objections were over-ruled by the court, upon the ground that, as this was a *false receipt*, the case was clearly within the statute on which the indictment proceeded. And, after observing that the prisoner knew he had obtained the bill fraudulently; that, the better to elude enquiry after him, it was necessary to conceal his name; and that his object was to defraud the real owner of the bill of its value; they held that, if he intended to defraud any body by the fictitious signature, it was sufficient to constitute forgery. The jury having found the prisoner guilty, the judgment was respited, and the case referred to the consideration of the twelve Judges; eleven of whom were of opinion that, though the prisoner did not gain any additional credit by signing the name "W. Wilson" to the receipt, as the bill was not by the indorsement made payable to the person whose name was used, yet still it was a forgery; for it was done with intent to defraud the true owner of the bill, and to prevent the person receiving the money from being so readily traced. (c)

The following proposition is stated as having been the subject of much difference of opinion:—"That, if a person give a note or other security, as his own note or security, and the credit thereupon be personal to himself, without any relation to another, his signing such a note with a fictitious name may indeed be a cheat, but will not amount to forgery; for, in such a case,

(c) Taylor's case, O. B. October 1779, and M. T. 1779. 1 Leach, 214. 2 East. P. C. c. 19. s. 46. p. 960. Buller, J., doubted.

Sheppard's case; holden to be forgery to draw a draft upon a banker in a fictitious name, assumed by the party at the time for the purpose of fraud, and to avoid detection, though the credit were given to the person of such party.

"it is really the instrument of the party whose act it purports to be, and the creditor had no other security in view." (d)

In one case, where the credit was without doubt given personally to the prisoner, the security tendered being considered as his alone, the Judges agreed unanimously that the offence amounted to forgery. The prisoner was indicted for uttering the following order for payment of money, knowing it to be forged, with intention to defraud James Elliott. (e)

Green-street, 31st July, 1781.

"SIRs,—Pray pay to Mr. John Atkins, or bearer, Six Pounds, Six Shillings; value received.

Your's, &c.

"H. TURNER."

"To Messrs. Brown, Collinson, and Co., Lombard-street."

The following facts appeared in evidence. The prosecutor was a silversmith; and the prisoner, having looked out several goods at his shop, to the amount of six guineas, pulled out his purse, as if going to pay for them, saying, "I believe I have not cash enough about me, but here is a draft on a banker, which is the same thing as money, for it will be paid when presented." He accordingly laid the draft on the counter, and desired to see some silver spurs; but the prosecutor, not having any of the kind which he described, the prisoner said that he must send him a pair. Mr. Elliott looked at the draft as it lay on the counter; and seeing it was upon a house he knew, he took it, the sum being a small one, and the prisoner having a genteel appearance: and he then took his order-book, for the purpose of making a memorandum of the prisoner's direction; and supposing his name to be the same as that in which the draft, which he conceived to be the prisoner's, was signed, he wrote, "H. Turner, Esq." The prisoner looked over him, and desired him to add, "Junior, Noah's Row, Hampton Court," and then went away. Mr. Elliott further stated, that he gave credit to the prisoner, and not to the draft. It appeared that no person of the name of H. Turner kept cash at Brown and Collinson's, or lived in Green-street; nor could such a place as Noah's Row, or such a person as H. Turner, jun., be found at Hampton Court. Upon these facts the jury found the prisoner guilty, and he received judgment of death; but the execution of the sentence was respited on a doubt, whether, as Mr. Elliott had sworn that he gave credit to the prisoner, and not to the draft, it could amount to the crime of forgery. The twelve Judges were unanimously of opinion that the conviction was right; for it was a false instrument, not drawn by any such

(d) One of the principles laid down in Dunn's case, 1765. 2 East. P. C. c. 19. s. 48. p. 961. *Ante*, p. 326, *et sequ.*

(e) In the report of the case in 2 East. P. C. c. 19. s. 50. p. 967., it is

stated that the prisoner was indicted for *forging* the order. Probably there were counts for forging, and for uttering the order knowing it to be forged.

person as it purported to be, and the using a fictitious name was only for the purpose of deceiving. (*f*)

But the following case, which occurred only a few years afterwards, is mentioned as one in which the Judges were much divided in opinion, though not easily to be distinguished in principle from that which has been just cited.

The prisoner, J. H. Aickles, was indicted for forging a promissory note, in the following form, with intent to defraud one R. H. Gedge. A second count charged him with uttering such note, knowing it to be forged.

"London, Dec. 18, 1786.

"Three months after date, I promise to pay to H. Byron, Esq., or order, £25. 10s. 0d. value received."

"£25. 10s. 0d.

JOHN MASON,

"No. 4, Argyle-street, Oxford-road."

It appeared that the note in question was, on the 9th of January, 1787, tendered by Byron to Gedge's shopman, in payment for some linens that were shewn by him to Byron. Upon being asked who John Mason was, Byron described him as a gentleman of fortune, with whom he was concerned in a coal-mine, living at No. 4, Argyle-street. The shopman declined leaving the goods with him; but promised to send them, if, upon inquiry, the note were good. He immediately went to No. 4, Argyle-street, and inquired for Mr. Mason; the prisoner appeared, and said his name was John Mason, and that the note was drawn by him, and should be paid when due. It was proved that, before the 9th of January, the prisoner had taken the house No. 4, Argyle-street, in the name of John Mason, Esq., and that the person who let the house had enquired concerning him, by this description, at the British Coffee-house, and received a favourable account of his character. It was then proved that he had always passed by the name of John Henry Aickles, and had been tried several times at the Old Bailey, and was known by that name since the year 1780, until the present time. Upon this evidence, Grose, J. who tried the prisoner, entertained some doubt, and directed the jury that they could only convict the prisoner in case they believed that this note was drawn by him, in consequence of a concerted scheme between him and Byron, to defraud Gedge, that the prisoner had never gone by the name of John Mason before, and had assumed it for the purpose of this fraud. And he said, that if they were satisfied on these points, they might find the facts, and he would state them to the Judges. Thereupon the jury found specially, that the prisoner intended to defraud Gedge, and assumed the name of Mason for the purpose of this fraud; that he had never gone by that name before; and that they disbelieved a witness on the part of the prisoner, who had deposed that, two years before, he was inquired for and known by that name at the British coffee-

Aickles's case. It appears to have been doubted whether it was forgery where the prisoner, whose name was Aickles, had a month before taken the house in which he lived in the name of Mason, and passed off a promissory note in that name, which he avowed to be his, dated some time before, but not payable till after the time of his trial: though the jury found that he assumed the name of Mason, by which he was never known before, for the purpose of the fraud.

(*f*) Sheppard's case, O. B. Sept. 1781, Mich. T. 1781. 1 Leach, 226. 2 East. P. C. c. 19. s. 50. p. 967., where it is said that Taylor's case,

(*ante*, §30,) Lockett's case, (*ante* §29,) and Dunn's case, (*ante*, §26,) were relied on.

house. On this a verdict of guilty was taken by consent, subject to the opinion of the Judges on the case.

The opinion of the Judges was pronounced upon this case by Ashhurst, J., to the effect that it did not amount to forgery. But the judgment appears to have been given under a misconception that the Judges had so decided; when, in fact, the case had been adjourned for further consideration. (g) It afterwards underwent further discussion, when many of the Judges seemed to entertain an opinion that it was forgery; but several thought otherwise; and they never came to any final resolution on the matter. (h)

Reasons upon which it was thought that the foregoing case amounted to forgery.

The following reasons are given as those upon which Gould, J., and the other Judges who coincided with him, thought that the case amounted to forgery. There was an apparent design for fraud in general; and the jury were satisfied that the prisoner had assumed the name of Mason, which was not his name, nor had ever been used by him before, but always Aickles, with intent to defraud Gedge. He, therefore, made the note in the name of another, as if his own, and clearly with an intent to defraud. Whether there existed a person of that name or not was immaterial; the felony consisted in the intent to defraud under the falsity. One might assume a feigned name, and make a draft in it, and yet innocently; as if he concealed himself to avoid arrest, and had appointed his friend on whom he drew to pay his bills; or, giving notes, took care to pay them when due. But the prisoner, having no such intention, but, on the contrary, to defraud the party, by making the note under such disguised name, by which, after he left the place of concealment, he could not be traced; the case amounted to forgery. There was no ground, he thought, to distinguish this from the common case where the draft is made in the name of a person who does not exist. It was in reality a deeper fraud, because the entity of such drawer would at once be disavowed at the place of his supposed residence; whereas, in the present case of a note, there would be no circumstance to find out the maker when he quitted the place where he made the note.

Reasons against the conviction.

The Judges, who inclined against the conviction, went on the doubt whether, to constitute forgery, it was not necessary that the instrument should be made as the act of another, (i) according to the definition of Lord Coke, whether that other existed or not. Whereas, here the note was made as the prisoner's own, and avowed by him to be so. The credit was given to the person, and not to the name; and the person, and not the name, was the material thing to be considered. (k)

Sir E. H. East enters at some length into the discussion of this point; and endeavours to ascertain the grounds upon which the Judges, who inclined against the conviction, might possibly have proceeded. But he again repeats, that it seems very difficult to

(g) 2 East. P. C. c. 19. s. 50. p. 969. 1 Leach, 440.

(h) Aickles's case, 1787, 1 Leach 438. 2 East. P. C. c. 19. s. 50. p. 968. The prisoner was remanded upon a former sentence; having, previously to the present charge,

been tried for returning from transportation, and acquitted.

(i) See Lewis's case, *ante*, 328, note (u).

(k) 2 East. P. C. c. 19. s. 50. p. 969, 970.

distinguish the case from that of Sheppard : and he says that he cannot help suspecting that much of the difficulty in these cases arises from mistaking matters of fact for matters of law, and confounding the two together. (*l*) A learned writer, who has been several times referred to in the latter part of this work, observes, that it may be difficult to admit that the case involved any real ground of doubt when the specific fraudulent intention was expressly found, and the taking the house was only a part of the machinery of the fraud : and, with respect to Sir E. H. East's suggestion, that the difficulty may have arisen from mistaking matters of fact for matters of law, he further observes, that this seems to be the true view of the case ; for, if the use of the assumed name is intended to commit a fraud in the particular instance, there is no reason for not treating it as a forgery, although that may only be part of a more general system of fraud, which such assumption is intended to carry into effect. (*m*)

In a more modern case, where the indictment charged the prisoner, Samuel Whiley, with forging a bill of exchange for 60*l.* dated Bath, Jan. 5th, 1805, drawn in the name of Saml. *Milward*, payable to his own order on Messrs. Stephenson & Co., bankers, in London, with intention to defraud H. Thurston ; and (in a second count) with uttering such bill knowing it to be forged ; the following facts appeared in evidence. The prosecutor was an upholsterer in Bath : and on the 27th Dec., 1804, the prisoner, being at that time a stranger to him, came to his house, and applied to take a coach-house and stable, which the prosecutor let him for three months. The prisoner then bespoke some goods of the prosecutor to the amount of 16*l.* 2*s.*, which he directed to be sent to him, writing his direction in the prosecutor's book, " Saml. Milward, No. 12, Kensington-place, Bath." In the course of three days the goods were sent ; and the prisoner came shortly afterwards, and ordered more goods ; and before all the goods were delivered, he told the prosecutor to get his bill ready by four o'clock, on Old Christmas eve, at which time he would call for it. He called at the time appointed ; and the bill, amounting to 49*l.* 10*s.* was given to him. He said the bill was very right ; that it was his rule to discharge all bills on Old Christmas eve ; and that he would return again in ten minutes ; which he did. bringing with him the bill of exchange in question ; and saying that he would give the prosecutor a draft on his banker in London for 60*l.* The prosecutor looked at the bill of exchange, which was indorsed with the name " Saml. Milward ;" and, upon the prisoner saying it was a good one, gave him the balance of ten guineas. The prisoner then told the prosecutor that he should want more goods, and should be a very good customer to him. The bill of exchange having been sent to the bankers, in London, was returned to the prosecutor on the 25th Jan. dishonoured, and the prosecutor went immediately to the prisoner's house, in Bath, but he found it shut up, and saw nothing more of the prisoner till about three weeks afterwards, when he was in custody. A clerk from the London

Whiley's case. Conviction of forgery holden to be right where the name made use of by the prisoner in the forged instrument was assumed by him with the intention of defrauding the prosecutor, though the prisoner's real name would have carried with it as much credit as the assumed name.

(*l*) 2 East. P. C. c. 19. s. 50. p. 970. p. 580. ; and Hadfield's case is cited.
(*m*) 6 Ev. Col. Stat. Part V. Cl. xii. See *ante*, 327.

bankers, Messrs. Stephenson and Co., proved that they knew no such person as Saml. Milward. And it was satisfactorily proved that the prisoner's real name was Saml. *Whiley*; that he was baptized as the son of persons of that name, was married by that name, had gone by the same name at Bath, when he lodged there for about a week in the July preceding this transaction; and at Bristol in the following October; as also at Bath again on the 4th of December; and further, that on the 20th of December (which was about a week before he first came to the prosecutor) he had taken a house in Worcestershire, under the same name. But on the 28th of December (the day after his first application to the prosecutor) he ordered a brass plate to be engraved with the name of "Milward," which was fixed on the door of his house on the following day. The prisoner stated in his defence that he had understood from his father that he was christened by the name of Saml. Milward; and that, being under difficulties, and afraid of arrests, he had omitted the name of Whiley. In answer to questions put by the learned Judge who tried the prisoner, the prosecutor stated that he took the draft on the credit of the prisoner, whom he did not know; that he presumed the prisoner's name was that which he had written, and had no reason to suspect the contrary: but that if the prisoner had come to him under the name of Saml. Whiley, he should have given him equal credit for the goods, and have taken the draft from him and paid him the balance as he had done when he came under the name of Milward. The learned Judge left it to the jury to say whether the prisoner had assumed the name of "Milward" in the purchase of the goods, and given the draft, with intention to defraud the prosecutor. And the jury, saying that they were satisfied of that fact, found the prisoner guilty. The case was afterwards submitted to the consideration of the twelve Judges; who were of opinion that the question of fraud being so left to the jury, and found by them, the conviction was right.(n)

Francis's case. If the name used by the prisoner be assumed for the purpose of fraud, and to avoid detection, it will be as much a forgery as if the assumed name were the name of a person of known credit.

In a case which occurred a few years afterwards, the prisoner was indicted for forging an order for the payment of money, in which, by the name of *James Cooke* junior, he requested Messrs. Praed and Co., bankers, in London, to pay Mrs. Ware, or bearer, fifteen pounds. It appeared in evidence that on the 15th August, 1808, the prisoner took lodgings at the house of Mrs. Ware, by the week, and continued there till the 9th of September following, on which day he gave Mrs. Ware the order in question for a bank note of fifteen pounds, which she advanced to him upon his applying to her for change. Mrs. Ware paid the order away to a neighbour, who took it to the bankers; and, upon payment being refused, brought it back to Mrs. Ware, who immediately informed the prisoner of its being returned. The prisoner, first reading over the order, said that he saw he had made a mistake, and had forgotten to put the word "junior," which word he then added, and said that Mrs. Ware would find it would be right. Shortly

(n) Whiley's case, *cor.* Thomson, B., *Somersetshire*, Spr. Ass. 1805; and before the Judges, Trin. T. 1805. MS.

and Russ. & Ry. 90. S. P. Rex v. Marshall, Russ. & Ry. 75.; and Rex v. Francis, *id.* 209. and *infra*.

afterwards the prisoner left the house, saying he should return to tea; but he never did return. The order, with the addition, was presented at Messrs. Praed and Co.'s, the next morning, and payment refused, the drawer not being known at that house, and no person of that name keeping cash there. It was satisfactorily proved that the prisoner's real name was John Francis, though he had occasionally gone by other assumed names. The case was left by the learned Judge to the jury, with a direction that they should consider whether the prisoner had assumed the name of *James Cooke, junior*, with a fraudulent purpose; and they found a verdict of guilty: but upon some doubts occurring whether the facts in evidence went to establish a forgery, or only a fraud, the case was referred to the consideration of the twelve Judges. Mansfield, C. J., the Chief Baron, Grose, J., and Lawrence, J., were absent when the case was debated; but the Judges, who were present, held the conviction right: and were of opinion that if the name were assumed for the purpose of the fraud, and avoiding detection, it was as much a forgery as if the name assumed were that of any other person of known credit; though the case would have been different if the party had habitually used and become known by another name than his own. (o) But it seems that it must satisfactorily appear that the fictitious name was assumed for the purpose of fraud, in the particular instance of the forgery in question, and that it will not be sufficient to shew that the fictitious name had been assumed for general purposes of concealment and fraud: as in a subsequent case, in which the prisoner was charged with forging an acceptance upon a bill of exchange in the name of Scott, the majority of the Judges, being of opinion that it did not sufficiently appear upon the evidence that the prisoner had not gone by the name of Scott before the time of accepting the bill in that name, or that he had assumed the name for that purpose, held that a conviction for such forgery was wrong. (p)

But forging in a false name assumed for concealment, with a view to a fraud, of which the forgery is part, is sufficient to constitute the offence. And if there be proof of the prisoner's real name, it is for him to prove that he used the assumed name before the time he had the fraud in view, even in the absence of proof as to what name he had used for several years before the fraud in question. (q)

Having thus treated of the name in which a forgery may be committed, we may proceed to consider how far the *validity* in law of the thing forged, supposing it were true, is essential to forgery.

As to the validity of the thing forged, if genuine.

Though it is said to be in no way material, whether a forged instrument be made in such a manner as that, if it were in truth such as it is counterfeited for, it would be of validity or not; (r) yet it seems to be material, that the false instrument should carry

(o) Francis's case, Old Bailey, July, 1811; and before the Judges, December, 1811, MS. and Russ. & Ry. 209.

(p) Rex v. Bontien, December, VOL. II.

1813, Russ. & Ry. 260.

(q) Rex v. Peacock, Russ. & Ry. 278.

(r) 1 Hawk. P. C. c. 70. s. 7. 2 East. P. C. c. 19. s. 43. p. 948.

on the face of it the semblance of that for which it is counterfeited, and should not be illegal in its very frame. (s) One of the definitions of forgery is given, as "the false making an instrument, which purports *on the face of it* to be good and valid for the purposes for which it was created, with a design to defraud." (t)

Upon the ground that it is not material whether a forged instrument be so made as that, if it were in truth such as it is counterfeited for, it would be of validity or not, it has been adjudged that the forgery of a protection in the name of A. B., as being a member of parliament, who in truth at the time was not a member, is as much an offence at common law, as if he were so. (u)

In a case, where the defendant was convicted upon an indictment (on the statute 5 Eliz. c. 14.) which stated that one Garbut and his wife were seised in fee of certain messuages, lands, and tenements, called Jawick, in the parish of Clacton, in Essex, and that the defendant intending to molest them, and their interest in the premises, forged a lease and release as from Garbut and his wife, whereby they were supposed for a valuable consideration to convey to him "all that park called Jawick, in the parish of Clacton, in Essex, containing eight acres in circumference, with all the deer, wood, &c. thereto belonging," it was moved in arrest of judgment, that the premises supposed to be conveyed were so materially different from those which were really the estate of Garbut and his wife, that it was impossible this conveyance could ever molest or disturb them. But the Court held that it was not necessary, there should be a charge, or a possibility of a charge, and that it was sufficient if it were done with such intent, and that the jury had found that it was done with intent to molest Garbut and his wife in the possession of their land. (x)

So where an indictment was for forgery at common law of a surrender of the lands of J. S., and it was not shewn in the indictment that J. S. had any lands, it was holden upon motion in arrest of judgment that the indictment was good, upon the principle that it was not necessary to shew that the party was prejudiced. (y)

Forgery may be committed by the false making of the will of a living person; though a will is ambulatory during the life of a party, and can have no validity as a will until his death.

Upon the same principle, the doctrine is established by several cases, that forgery may be committed by the false making of an instrument, purporting to be the will of a person who is still living; notwithstanding the objection, that during the life of a party his will is ambulatory, and can have no validity as a will until his death. Thus, a prisoner was convicted for forging a seaman's will, who it appeared was still alive, and had returned to England two years after the prize money had been received by the pri-

(s) 2 East. P. C. c. 19. s. 43. p. 948.

(t) By Eyre, B. in Jones and Palmer's case, 1 Leach 367.

(u) Deakin's case, 1 Sid. 142. 1 Hawk. P. C. c. 70. s. 7. 2 East. P. C. c. 19. s. 43. p. 948.

(x) Crooke's case, B. R. East. T.

4 Geo. 2. 2 Str. 901. 2 East. P. C. c. 19. s. 33. p. 921.

(y) Goat's case, 1 Ld. Raym. 737. But it seems clearly to be necessary, that there should be a possibility of prejudice to the party. See the definitions *ante*, 317, and Ward's case, 2 East. P. C. c. 19. s. 7. p. 862. *post* 350.

soner, under a forged will. (z) In a subsequent case, where the prisoner was indicted for forging the last will and testament of a woman who was still living, and was a witness on the trial, and convicted, the judgment was respited upon a doubt, whether as the supposed testatrix was living, the prisoner was legally convicted of having forged her *last will* and testament; there being no such instrument as a last will and testament in contemplation of law, until after the death of the person making it: but the Judges are said to have been unanimously of opinion, that an instrument may be the subject of forgery, although in fact it should appear impossible for such an instrument as the instrument forged to exist, provided the instrument purports on the face of it to be good and valid, as to the purposes for which it was intended to be made. (a) The point was again referred to the consideration of the Judges, in a case where the prisoner was indicted and convicted for knowingly uttering and publishing as true, a certain false and forged will and testament of one J. G., late a seaman belonging to a merchant vessel, &c. and it appeared, that the said J. G. was living. All the Judges held that the conviction was right. It was observed by the learned Judge who delivered their opinion, that every will must be made in the lifetime of the party, whose will it was; that it existed as a will in his lifetime, though not to take effect till his death; and that the making a false instrument importing on the face of it to be a will, was equally forgery, whether the person whose will it purported to be were dead or alive, at the time of making it. That a contrary doctrine would operate as a repeal of the law; for if the act of making the will were not forgery at the time, a publication afterwards would not make it so. Buller, J., thought the very definition of forgery decided the doubt, for it was the making a false instrument with intent to deceive; and that here the intention to deceive had been established by the jury, and the instrument purporting to be a will was clearly false. (b) On an indictment for forging a will the probate of that will unrevoked is not conclusive evidence of its validity so as to be a bar to the prosecution. (c)

Forging a deed has been holden to be within the statute 2 Geo. 2. c. 25. s. 1. though subsequent statutes contain directory provisions as to instruments for the purpose for which such forged deed was intended being in a particular form, or complying with certain requisites, and the forged deed has not been made in pursuance of such provisions; for the directory provisions have not the effect of making a deed, not in the form prescribed, and without the requisites, altogether void. (d)

Forgery of instruments not conformable to the directory provisions of a statute.

(z) *Murphy's case*, O. B. 1753. 10 St. Tri. 183. (Hargr. ed.) 2 East. P. C. c. 19. s. 43. p. 949.

(a) *Sterling's case*, O. B. 1773. 1 Leach 99, where it is said, that the case was decided upon the authority of *Anne Lewis's case*. *Fost.* 116. *Ante*, 328.

(b) *Coogan's case*, O. B. 1787, and *Mich. T.* 1787. 1 Leach 449. 2 East. P. C. c. 19. s. 43. p. 948. The indictment appears to have been framed on

the statute 2 Geo. 2. c. 25. and not on the statute 31 Geo. 2. c. 10. s. 2. which is confined to seamen on board the king's ships. The last statute has the words "*last will*," the other the word "*will*" only.

(c) *Rex v. Buttery and Macnamara*, *Russ. & Ry.* 342.

(d) *Rex v. T. R. Lyon*, *Russ. & Ry.* 255., and see *Rex v. Frond*, *Russ. & Ry.* 389. *post.*

Forgery may be committed of an instrument on unstamped paper.

Hawkeswood's case. Forgery of a bill of exchange on unstamped paper.

Upon the same principle also, of its not being necessary that the instrument charged to be forged, should be such as would be effectual if it were a true and genuine instrument, it has been holden, that forgery may be committed of an instrument on *unstamped* paper.

The prisoner Hawkeswood, being indicted for forging a bill of exchange, an objection was taken on his behalf, that the bill in question was not stamped pursuant to the statutes 22 Geo. 3. c. 33., 23 Geo. 3. c. 49. s. 14., and 23 Geo. 3. c. 58. s. 11.; (e) and that it was not, therefore, a lawful bill of exchange but a piece of waste paper incapable of becoming the subject of either fraud or felony; that the party who took it must at the time have known that it was not a legal bill of exchange, or he must have been grossly negligent, the defect being visible on the face of it. But Buller, J., who tried the prisoner, over-ruled the objection, on the ground that the stamp acts were merely revenue laws, and did not purport in any way to alter the crime of forgery; and that the false instrument had the semblance of a bill of exchange, and was negotiated by the prisoner as such. But he saved the point for the consideration of the twelve Judges, who were all of opinion, that the prisoner was properly convicted; that the stamp acts, in saying that a bill without a stamp shall not be pleaded, or given in evidence, or be available, in law or equity, signified only that it should not be made use of to recover the debt; and further, that the holder might get the bill stamped after it was made. (f)

This authority was acted upon in a case which occurred very shortly afterwards, where the prisoner being indicted for forging a bill of exchange, an objection which was taken to the bill being produced in evidence because it was not stamped was over-ruled, and the prisoner was convicted and executed. (g)

Morton's case. Holden that forgery might be committed of a promissory note on unstamped paper, though the statute 31 Geo. 3. c. 25. s. 19. prohibited the stamp from being affixed afterwards.

The point underwent further discussion in a case which occurred after the statute 31 Geo. 3. c. 25. s. 19. had prohibited the stamping of a bill or note after the time of their being made. The prisoner, Morton, was indicted for knowingly uttering a forged promissory note, which, on being produced in evidence, appeared to have been drawn on unstamped paper; and the case was saved for the opinion of the Judges, as well on the principal point, as on the statute 31 Geo. 3. c. 25. s. 19. which passed after Hawkeswood's case, and prohibited the stamp to be afterwards affixed. The question underwent much consideration, and was debated by the Judges in the course of several terms. Two or three of the Judges doubted at first the propriety of Hawkeswood's case, if the matter were *res integra*, yet they all agreed that they must be governed by that case, as it was an authority in point; and that the statute 31 Geo. 3. c. 25. s. 19. made no difference in the question. And most of the Judges maintained the principle in Hawkeswood's case to be well founded; for they held that the acts of parliament which had been

(e) The provisions of the acts are to the effect that no bill of exchange, &c. not stamped as these acts direct, shall be pleaded, or given in evidence in *any* court, or admitted in *any* court to be good or available in law or equity.

(f) Hawkeswood's case, *Worcester Spring Ass. and East. T. 1783.* 1 Leach 257. 2 East. P. C. c. 19. s. 45. p. 955.

(g) Lee's case, O. B. 1784. 1 Leach 258, note (a).

referred to and relied on, being mere revenue laws, meant to make no alteration in the crime of forgery, but only to provide that the instrument should not be available for the purpose of recovering on it in a court of justice; but it might be received in evidence for collateral purposes; and they instanced the 6th and 10th sections of the act which made the party, drawing such a bill, liable to the statute duties, and to a penalty of 20*l.*; in both which cases the bill must be used in evidence. And they considered that in order to constitute forgery it was not necessary that the instrument should be available; that though a compulsory payment, by course of law, could not have been enforced for want of the proper stamp, yet a man might equally be defrauded by a voluntary payment being lost to him; that if this were a sufficient defence, forged securities might be published on improper stamps with impunity, which would carry the mischief to an alarming extent; that the stamp itself might be forged; and it would be a strange defence to admit in a court of justice, that because a man had forged the stamp, he ought to be excused for having forged the note itself, which would be setting up one fraud in order to protect him from the punishment due to another. (*h*)

So where it appeared that the forgery, charged against the prisoner, was the alteration of a 10*l.* bill of exchange into one for 50*l.*, it was holden to be not less a forgery from the circumstance of the bill having been re-issued three times as a 10*l.* bill without being re-stamped, and being, therefore, not available in a civil action at the time the alteration in it of 10*l.* into 50*l.* was effected. The Judges, on a conference, said that it had been decided that the stamp acts had no relation to the question of forgery; and that supposing the instrument forged to be such on the face of it as would be valid, provided it had a proper stamp, the offence was complete. (*i*)

The same doctrine was acted upon in several other cases. (*k*) And it is well observed that if the matter be duly considered, the words of the stamp acts before-mentioned can only be applicable to a true instrument; for a forged instrument, when discovered to be such, never can be made available, though stamped: and that the acts, therefore, can only be understood as requiring stamps on such instruments as were available without a stamp before those acts passed, and which would be available afterwards with a stamp. (*l*)

It has been spoken of as a material circumstance, that the false instrument should carry on the face of it the semblance of that for which it is counterfeited. (*m*) But it is not necessary that the resemblance to the known instrument should be exact: it seems to be sufficient if the instruments be so far alike that persons in

The same doctrine acted upon in other cases.

The false instrument should carry on the face of it the semblance of that for which it is

(*h*) *Morton's case*, *York Sum. Ass.* 1795. *Mich. T.* 1795. and *Hil. and East. T.* 1796. 2 *East. P. C. c.* 19. s. 45. p. 955.

(*i*) *Teague's case*, *cor. Le Blanc, J.*, *Hereford Sum. Ass.* 1802, and *Mich. T.* 1802. 2 *East. P. C. c.* 19. s. 55. p. 979.

(*k*) *Reculist's case*, *O. B.* 1796. 2 *Leach* 703. *Davies's case*, *cor. Grose, J.*, *Surry Spr. Ass.* 1796. 2 *Leach* 707. note (*b*). 2 *East. P. C. c.* 19. s. 45. p. 956.

(*l*) 2 *East. P. C. c.* 19. s. 45. p. 956.
(*m*) *Ante*, 337, 338.

counterfeited;
so as to de-
ceive persons
using ordinary
observation.

general using their ordinary observation upon the subject may be imposed upon by the deception, though it would not impose upon persons having particular experience in such matters. (n)

Thus where the prisoner was indicted for the forgery of bank notes, and a witness for the prosecution, who came from the Bank of England, stated that he could not have been imposed upon by the forged notes, the difference between them and the true notes being to him very apparent in several particulars, but it appeared that others had been deceived at first by them, though they were very ill executed, Le Blanc, J., proceeded upon the foregoing principles. (o)

Elliot's case.
A conviction
is good for
forging a bank
note, though
in such forged
note the word
"pounds" be
omitted, and
though there
be no water-
mark in the
paper.

The doctrine had previously been sanctioned by the opinion of the Judges in the following case. The prisoner, James Elliot, was indicted for forging a bank note of the following tenor.

No. 17.73.

I promise to pay to Mr. Jos. Crook or bearer, on demand, the sum of Fifty

£ Fifty.

London, 20 June, 1775.

For the Govr. and Company of the
Bank of England.

Entd. C. BLEWERT.

THOS. THOMPSON.

Some of the counts of the indictment stated the instrument to be a bank note, and others to be a note in the form of a bank note; but the fifth count, which was that on which the question turned, and on which the counsel for the crown relied, charged "that the said James Elliot, on the 14th June, 1777, feloniously did make, forge, and counterfeit, and cause and procure to be falsely made, forged, and counterfeited, &c. *a certain promissory note for the payment of money*, with the name of *Thomas Thompson*, thereunto subscribed, purporting to bear date, &c., and to have been signed by one *Thomas Thompson*, for the Governor and Company of the Bank of England, for the payment of fifty pounds to Mr. Joseph Crook or bearer, on demand, the tenor of which, &c., with intention to defraud the Governor and Company of the *Bank of England*." It appeared that the note had never been published, being found in the prisoner's possession at the time he was apprehended; but the forgery was brought home to him, and he was convicted. The doubt concerning his case arose upon the following facts, which appeared in evidence. The officers of the Bank of England proved that the note was in every respect, both in paper and print, similar to a bank note, both in the written and printed parts of it, except, first, that the number was not filled up; secondly, that the word "pounds" was omitted in the body of the note; thirdly, that the texture of the paper was rather thicker than that used by the bank; and, fourthly, that, in the fabric of it, the water mark, *viz.* the words "Bank of England," were not inserted: but they said that a bank-note, with the like omission of the word "pounds" in

(n) 2 East. P. C. c. 19. s. 6. p. 858. *Exeter* Spr. Ass. 1802. 2 East. P. C. and s. 44. p. 950, c. 19. s. 44. p. 950.

(o) Hoost's case, *cor.* Le Blanc, J.,

the body of it, being regular in other respects, would be paid, by the usage of the bank, after it had passed the examiner's office. And a real bank note of the same date and tenor, except as above excepted, was produced in evidence. Upon these facts it was contended that this was not a note resembling a bank note for want of the *water mark*; and also that it was not a note for *fifty pounds*, the word "*pounds*" being omitted: and judgment was respited in order to take the opinion of the twelve Judges. The case was considered by them, and they were all (except De Grey, C. J., and Smythe, C. B., who were absent,) of opinion that the conviction was right; as in forgery there need not be an exact resemblance; and it is sufficient if the instrument is *prima facie* fitted to pass for a true instrument. The majority of the Judges inclined to think that the omission of the word "*pounds*" in the body of the note, had nothing else appeared, would not have exculpated the prisoner; and that it was matter to be left to the jury, as it was done, whether it purported to be a note for *fifty pounds*, or any other sum: and all the Judges agreed that the "*fifty*" in the margin of it removed every doubt, and shewed that the *fifty* in the body of the note was intended for *fifty pounds*. (p)

Upon the same principles, in a case where the prisoner engraved a counterfeit medicine stamp, so as to be like to a genuine stamp, except only that the centre part, which in a genuine stamp specifies and denotes the duty, was blank in the first instance, but cut out before the counterfeit stamp was used, a paper with the words "*Jones, Bristol*" on it being pasted over the vacancy, and then uttered such counterfeit stamp, it was holden that he was guilty of a forgery and uttering. Grose, J., in delivering the opinion of the twelve Judges on this case, after stating that it was proved that those parts of the counterfeit stamp which remained were a perfect resemblance of the same parts on a genuine stamp, and that the whole was a fabrication so artfully contrived as to be likely to deceive the eye of every common observer, further said, "*An exact resemblance or fac-simile is not required to constitute the crime of forgery; for if there be a sufficient resemblance to shew that a false making was intended, and that the false stamp is so made as to have an aptitude to deceive, that is sufficient.*" (q) It has been determined on the statute 25 Edw. 3., that splitting the great seal, and closing it again to a false patent, is a counterfeiting of the seal: (r) and that where the seal is substantially counterfeited, the adding or omitting of a crown, the leaving out words in the style, or adding others, or making any other minute variation in the counterfeit, which is often done purposely, and by way of eluding the law, will not alter the case. (s)

Collicott's case. Engraving a counterfeit stamp like in some part to a genuine stamp, and unlike in others, and then cutting out the unlike parts, and concealing the part cut out, and then uttering it, is a forgery and guilty uttering.

(p) Elliot's case, *Maidstone Sum. Ass.* 1777. Mich. T. 18 Geo. 3. 1 Leach 175. 2 East. P. C. c. 19. s. 44. p. 951. 2 New R. 93. note (a).

(q) Collicott's case, 1812. 2 Leach 1048. 4 Taunt. 300. Russ. & Ry. 212, 229.

(r) 1 Hale 178, 184.

(s) Robinson's case, 2 Roll. R. 50. 1 East. P. C. c. 2. s. 25. p. 86. This was an indictment under the statute 1 Mary, c. 6. for counterfeiting the privy signet. In 1 East. *ub. sup.* it is said, "*The disparity, however, may be so great between the true and false seal that it would not amount*"

A mere literal mistake will not make any difference.

And it seems that a mere literal mistake in the framing of the instrument itself, well laid in the indictment, will not make any difference. And it is observed, that in a case where the prisoner, in forging an order for the delivery of goods, blundered in spelling the name, using *Desemockex* for *Desormeaux*, no stress was laid on such circumstances, though on other grounds the indictment was holden bad.^(t)

Fitzgerald and Lee's case. Forgery may be committed of a will, though it be signed in the wrong *Christian* name of the person whose will it purports to be.

The prisoners, Dominick Fitzgerald and James Lee, were indicted for forging the last will and testament of Peter Perry, late a seamen on board his Majesty's ship the Lancaster, with intent to defraud the King. The will began—"In the name of God, his

Amen, I, *Peter Perry*, &c., and ended *John* ✕ *Perry*." Upon the mark

evidence it appeared that the prisoner, Fitzgerald, carried the will to the office of the deputy register, who, on observing the difference of the Christian names, told him that he must produce the person who had written the will, or the person who was present when it was executed, in order to account for this error, before the probate could be granted. Fitzgerald accordingly produced the other prisoner Lee, who, in the name of Welsh, swore that he was one of the subscribing witnesses; that the name of the deceased was Peter Perry; that the said Peter Perry did make his mark to, and deliver the said will; and that he (Welsh) by mistake had written the name John Perry instead of Peter Perry. Upon this a probate of the will was granted. The prisoner having been found guilty, the question was reserved for the consideration of the Judges, whether this was in law a forging of the will of *Peter Perry*, as laid in the indictment? And, though no opinion was ever publicly delivered, the prisoners were afterwards executed pursuant to their sentence.^(u)

Wicks's case. Forged bill of exchange, though no indorsement of the names of the drawers.

In a case where it was proved that the prisoner took a bill of exchange, which he was indicted for forging and uttering knowing, &c. to a banker's, in order to get it discounted, and, upon receiving the discount, indorsed it there, but not in his own name; and it appeared also, that though there was the indorsement of another name upon the bill besides that which the prisoner indorsed, yet there was no indorsement upon it of the names or firm of the drawers who were also the payees; it was objected on behalf of the prisoner that, as there was nothing upon the bill purporting to be an indorsement of the drawers, it could not pass as a bill of exchange, nor was capable of defrauding the persons whose names were forged. ^(x) But the learned Judge who tried the prisoner overruled the objection, and the prisoner was convicted: and, upon the point being afterwards submitted to the

"to a counterfeiting within the statute, as if it be evident to the view of every man's eye."

^(t) 2 East. P. C. c. 19. s. 45. p. 952, 953. The case referred to is Clinch's case, 1 Leach 540. 2 East. P. C. c. 19. s. 37. p. 938.

^(u) Rex v. Fitzgerald and Lee, O. B. 1741. and Mich. T. 15 Geo. 2. 1 Leach 20. 2 East. P. C. c. 19. s. 45. p. 953.

^(x) Amongst other cases, Moffatt's case, *post* 348. and Wall's case, *post* 348, were cited.

consideration of the Judges, they were of opinion that the conviction was right. (y)

Where the prisoner drew a bill upon the treasurer of the navy, payable to blank or order, and signed it in the name of a navy surgeon, it was holden, that to constitute an order for payment of money, there must be some payee; and that a direction to pay to blank or order was not sufficient. (z) So where the prisoner was indicted for forging and uttering a navy pay bill, which was made payable to blank or order, it was holden that there must be some payee, and the conviction was held wrong. (a)

Omission of name of payee.

It is also laid down as clear, that it is no objection to the charge of forgery that the instrument is not available, by reason of some collateral objection not appearing upon the face of it. (b) So that, where a prisoner was indicted for forging an order for the payment of prize-money, and it appeared that the party whose name was forged was a discharged seaman, and was at the time the order bore date within seven miles of the port where his wages were payable; under which circumstances his genuine order would not have been valid by the provisions of the 32 Geo. 3. c. 34. s. 2., unless made in the manner therein prescribed; the offence was holden to be forgery, the order itself purporting, on the face of it, to be made at another place beyond the limited distance. (c)

It may be forgery though the instrument is not available by reason of some collateral objection.

But the offence will not be forgery where the false instrument does not carry on the face of it the semblance of that for which it is counterfeited, or where it is illegal in its very frame. (d)

But it will not be forgery where the false instrument has no semblance of the true one, or is illegal in its very frame.

In a case where the instrument charged to be forged was an order in the name of a creditor to a gaoler, for the discharge of a debtor who was in prison under an attachment for a contempt, it was objected that such instrument was a mere nullity in itself, even if genuine; but it became unnecessary to decide upon the objection. (e)

Where the false instrument was in the following form, without any signature—

Jones's case. Instrument defective as a bank note.

(y) *Rex v. Wicks*, *cor.* Wood, B. *Gloucester Spr. Ass.* 1809, and *East. T.* 1809, MS. and *Russ. & Ry.* 149. Bayley, J., was not at the meeting of the Judges, but he thought the conviction wrong, on the ground that for want of an indorsement the bill was not negotiable, and therefore, if genuine, would not have been of value to the taker of it. And see *Rex v. Cartwright*, *Russ. & Ry.* 106., where an indictment was held bad, on the ground that the instrument given in evidence was not, as stated, an order for money; and a question by Le Blanc, J., there mentioned in the note (b), whether this paper, though not directed to any person as drawer, might not, under circumstances, have been treated as a bill or

order.

(z) *Rex v. Richards*, *Russ. & Ry.* 193.

(a) *Rex v. Randall*, *Russ. & Ry.* 195.

(b) 2 *East. P. C. c.* 19. s. 45. p. 956.

(c) *M'Intosh's case*, *cor.* Le Blanc, J., O. B. 1800, and afterwards considered by the Judges, 2 *East. P. C. c.* 19. s. 39. p. 942. 2 *Leach* 883.

(d) *Ante*, 338.

(e) *Fawcett's case*, *York Spr. Ass.* 1793, 2 *East. P. C. c.* 19. s. 7. p. 862., and s. 45. p. 952., where the learned writer says, that it does not appear whether the Judges decided the case on that ground; as, at any rate, the indictment was holden good as a cheat. And see *Gibbs's case*, 1 *East. R.* 173. 2 *East. P. C. c.* 19. s. 7. p. 864.

No. F. 946.

I promise pay to John Wilson, Esq., or bearer, Ten Pounds.
London, March 4, 1776.

£ Ten.

For Self and Company, of my
Bank in England.

Entered, JOHN JONES.

and it was laid in one set of counts as a paper writing, purporting to be a *bank note*; and in another as purporting to be a promissory note, for the payment of money; it was holden that the prisoner was entitled to an acquittal, though it was specially found by the jury that the prisoner averred that the instrument was a good bank note, and uttered and published it as a good bank note. The Court said, that the representation of the prisoner could not alter the purport of the instrument, which was what appeared upon the face of the instrument itself; and that, although such false representations might make the party guilty of a fraud or cheat, they could not make him guilty of a felony. (e)

Reading's
case.

In a case where a bill of exchange was directed to "*John Ring*," and the acceptance was by "*John King*," and the indictment stated that the bill purported to be directed to *John King* by the name of *John Ring*, and that the prisoner forged the acceptance in the name of *John King*; judgment was arrested, because *Ring* could not purport to be *King*. (f)

Pateman's
case. Note
incomplete
for want of a
signature.

Forging or uttering a note which for want of a signature is incomplete, has been holden not to be an offence within the statute, by which forgery of notes is subjected to capital punishment. The prisoner was convicted of the offence of uttering and publishing as true a forged promissory note for the payment of 40*l*. with intent, &c. It appeared in evidence that the note in question had been originally issued by the *Bedford* bank as a one pound note, and was then as follows—

No. 16209.

Bedford Bank £1.

I promise to pay the bearer One Pound on demand here or
at Sir Charles Price, Bart., & Co. Bankers, London.

Value received.

Bedford, the 17th day of October, 1817.

For Barnard, Barnard, and Green.

Thomas Barnard.

that the note was afterwards altered by cutting out or obliterating the word One and pasting in or inserting in the place of it the word Forty, and by cutting off the last line which

(e) Jones's case, *cor.* Lord Mansfield, *Chelmsford* Sum. Ass. 1779, and B. R. Mich. T. 30 Geo. 3. Doug. 302. 1 Leach 204. 2 East. P. C. c. 19. s. 11. p. 883., and s. 45. p. 952. Upon this case, Mansfield, C. J., in the case of *Rex v. Collicott*, 4 Taunt. 303., ob-

served, "Jones's crime was that of telling a falsehood."

(f) Reading's case, O. B. 1793, and 1794, 2 Leach, 590. 2 East. P. C. c. 19. s. 45. p. 952., and s. 56. p. 981.

contained the signature, and by some other smaller alterations. The note then was as follows—

No. 16209.

Bedford Bank.

I promise to pay the bearer Forty pounds on demand here or at Sir Charles Price, Bart., and Co. Bankers, London.

Value received.

Bedford, the 17th day of October, 1817.

For Barnard, Barnard, and Green.

And in this form it was uttered by the prisoner, as a note for forty pounds, and the prosecutor gave him forty pounds in change for it.

Objection was taken on behalf of the prisoner, that this note as uttered by him was incomplete, and was not, nor did it purport to be, a promissory note, for want of the signature; and that, therefore, it was not the subject of forgery within the statute: and the point being reserved for the consideration of the Judges, they were unanimously of opinion that the objection was fatal, and the conviction wrong. (g)

In a case in which the prisoner had been convicted of a misdemeanor, as for an offence at common law, for disposing of, &c. an instrument in the form of a promissory note, the count upon which the prisoner was found guilty charged in substance as follows: namely, that the prisoner on, &c. with force and arms, at, &c. unlawfully and fraudulently did dispose of and put away to one J. H. a certain false, forged, and counterfeited *promissory note*, which said false, forged, and counterfeited promissory note was as follows:—that is to say,

Burke's case. Instrument averred to be a promissory note, but defective and held not to be the subject of indictment for forgery at common law.

No. 6414.

Blackburn
Bank.

30 Shillings.

I promise to take this as thirty shillings on demand, in part for a two pound note value received.

Entd. J. C.

Blackburn, Sept. 18, 1821. No. 6414.
For Cunliffe, Brooks, & Co.

30 Shillings.

R. Cunliffe.

With intention to defraud R. C., J. C., &c. the said prisoner at the said time he so disposed of, &c. well knowing the same to be false, forged, and counterfeited, to the great damage of the said R. C., J. C., &c. and against the peace, &c.

It was objected by the counsel for the prisoner, that the instrument or writing in question could not in any legal sense be denominated a promissory note, as charged in the indictment; and the learned Judge reserved the point for the consideration of the Judges, it appearing also to him that there was great doubt whe-

ther the genuine instrument or writing, supposed to be forged and uttered, had any legal validity; and whether it was not a mere nullity, for the forgery of which no indictment could be sustained. The case being submitted to the consideration of the Judges, they decided that judgment should be arrested. (*h*)

Moffatt's case. A bill of exchange drawn for less than the sum, and not in the form required by the statute 17 Geo. 3. c. 30., holden not to be the subject of a capital forgery.

Where the indictment was for knowingly uttering, as true, a forged acceptance of a bill of exchange; and it appeared that the bill in question was absolutely void by the provisions of a statute at that time in force, it was holden that a conviction could not be supported. The bill of exchange was of the following tenor—

SIR

Navy Office, 21st December, 1786.

Seven days after date, please to pay to Mr. John Moffatt, or his order, the sum of Three Pounds Three Shillings, and place the same to the account of

WALTER STERLING.

To George Peters, Esq.
Bank of England.

Accepted, G. Peters.

And the question was, whether, supposing this bill of exchange to be void, by the provisions of the statute 17 Geo. 3. c. 30. s. 1., (*i*) not being drawn according to the form therein prescribed, (as it neither specified *the place of abode of the payee*, nor *was attested by any subscribing witness*, though for less than 5*l.*.) the forging of it could be considered as a capital offence within the statutes 2 Geo. 2. c. 25., and 7 Geo. 2. c. 22., on which the indictment proceeded. All the Judges were of opinion that the conviction was wrong; on the ground that, if the bill in question had been a genuine instrument, it would have been absolutely void, and nothing could have made it good: and that, by the statute 17 Geo. 3. c. 30. such an instrument was no bill, and had not the appearance or semblance of one. (*k*)

Wall's case. A conviction for forging a will of land, attested by only two witnesses, holden to be wrong.

The prisoner, Thomas Wall, was convicted upon an indictment for forging and knowingly uttering a will of land of one John Skidmore, deceased, attested by only two witnesses; and, as it did not appear in evidence what estate the supposed testator had in the land so devised, or of what nature it was, so that it might be presumed to be freehold, and, therefore, the will void and of none effect, by the express enactment of the statute of frauds, (*l*) for want of the attestation of three witnesses, the Judges held the

(*h*) *Rex v. Burke, Russ. & Ry.* 496. It may be observed of the instrument stated in the indictment that it was not payable to the bearer on demand; that it was not payable in money; that the maker only promised to take it in payment; and that the requisitions of the statute 17 Geo. 3. c. 30. were not complied with.

(*i*) This statute continued in force till the end of the session of parlia-

ment, during which the forgery was committed. It was afterwards made perpetual by 27 Geo. 3. c. 16., but suspended by the 37 Geo. 3. c. 32. and other statutes, until six months after the ratification of a treaty of peace. See 1 Leach 434, note (*a*).

(*k*) *Moffatt's case*, O. B., 1787, and *Hill. T.* 1787. 1 Leach 431. 2 East. P. C. c. 19. s. 45. p. 954.

(*l*) 29 Car. 2. c. 3. s. 5.

conviction wrong; on the ground that, as it was not shewn to be a chattel interest, it was to be presumed to be freehold. (m)

SECTION II.

Of the Written Instruments in respect of which Forgery may be Committed.

We may now proceed to consider of the written instruments in respect of which forgery may be committed.

It is clearly agreed that, at common law, the counterfeiting of a matter of record is forgery; for, since the law gives the highest credit to all records, it cannot but be of the utmost ill consequence to the public to have them either forged or falsified. (n) Also, it is agreed to be forgery to counterfeit any authentic matter of a public nature; as a privy seal, (o) or a licence from the barons of the exchequer to compound a debt, (p) or a certificate of holy orders, (q) or a protection from a parliament man. (r) It is also unquestionable that a man may be, in like manner, guilty of forgery at common law, by forging a deed; (s) and, therefore, it seems that one may be equally guilty by forging a will, which cannot be thought to be of less consequence than a deed. (t) There seem to be some strong opinions in the books that the counterfeiting of any writings of an inferior nature to those above-mentioned is not forgery at the common law. (u) And it has been holden, that the forging of another's hand, and thereby receiving rent due to him from his tenants, is not punishable at all. (x) But Hawkins remarks, that it cannot surely be proved by any good authorities, that such base crimes are wholly disregarded by the common law, as not deserving a public prosecution; and that the opinion of their being punishable by no law seems not to be maintainable, since many of them are most certainly punishable by force of the 33 Hen. 8. c. 1.; and that it cannot be a convincing argument that they are not punishable by common law, because they are of a private nature, as much as other writings concerning other matters; no one being ready to affirm that the making of a false deed concerning a private matter is not punishable at common law. He further says that, perhaps it may be

Of the written instruments in respect of which forgery may be committed.

(m) Wall's case, *cor.* Thomson, B., Worcester Spr. Ass., 1800; and East. T. 1800. 2 East. P. C. c. 19. s. 45. p. 953, 954.

(n) 1 Roll. Ab. 65, 76. Yelv. 146. Cro. Eliz. 178. 8 Mod. 66.

(o) 1 Roll. Ab. 68. pl. 33. Cro. Car. 326. 1 Jones 323.

(p) 1 Roll. Ab. 65. pl. 5. 2 Buls. 137.

(q) 1 Lev. 138.

(r) 1 Sid. 142.

(s) 1 Roll. Ab. 66. Raym. 81. Ow. 47. 1 Sid. 278. 3 Leon. 170.

(t) Moor 760. Noy. 101. Dy. 302. 1 Hawk. P. C. c. 70. s. 10.

(u) 1 Roll. 431. 1 Sid. 16. 155. 451. 1 Roll. Ab. 66. Winch 40. 90. 1 Leon. 101. 3 Leon. 231. Cro. Eliz. 296. 853. 3 Buls. 265.

(x) Cro. Eliz. 166. Yelv. 146. 3 Buls. 265.

reasonable to make this distinction between the counterfeiting of such writings, the forgery whereof, as in the above cases, is properly punishable as forgery, and the counterfeiting of other writings of an inferior nature: that the former is in itself criminal, whether any third person be actually injured thereby or not; but that the latter is no crime, unless some one receive a prejudice from it. (y)

It is observed as no matter of surprise to find so able a writer as Hawkins treading with so much caution in a path, now indeed too well beaten; but which, previous to the time of the revolution, when paper securities became much more common, had been but little explored. (z) But with respect to the foregoing distinction which he takes, between the counterfeiting of such writings the forgery whereof is properly punishable as forgery, and the counterfeiting of other writings of an inferior nature, it is said that, however plausible this may be, it is by no means a solution of the difficulty but a mere conjecture, which leaves the crime of forgery as indistinct in principle as before, and tends to confound it with the general class of cheats: (a) and that it does not appear upon full consideration of the books to which he refers, that it is any where adjudged, or is even generally laid down, that the counterfeiting of writings of any sort, whereby any person may receive a prejudice, if done *lucri causâ* or *malo animo*, is not punishable as forgery. (b) It is also observed, that those books which seem at first sight most strongly to warrant the notion that writings of an inferior nature, such as letters, are not the subjects of forgery at common law, if fairly considered and compared, amount to no more than this, that the imputation of counterfeiting letters or writings *frivolous or of no moment, or from whence no damage could ensue, or of uncertain signification*, is not actionable; and that such letters or writings are incapable from their substance, not from their form, of supporting a charge of forgery, the chief ingredients of which offence are fraud and intention to deceive. (c)

Rule now settled that the counterfeiting of any writing with a fraudulent intent whereby another may be prejudiced is forgery at common law.

The points to which this discussion relates were fully considered in the following important case, in which it was holden that the counterfeiting of a release, or acquittance for a sum of money, though without seal, was forgery; and that it would be a most injurious notion, and even a reflection on the common law, to suppose it so defective as not to provide a remedy against offences of this nature. (d) And this case is considered as having now settled the rule, that *the counterfeiting of any writing with a fraudulent intent, whereby another may be prejudiced, is forgery at common law.* (e)

Ward's case. Forgery of an order to charge certain goods to account,

The Attorney-General, by order of the House of Lords, filed an information against the defendant John Ward, which charged that he being bound to deliver 315 tons and a quarter of alum, of the value of 1000*l.* to the duke of Buckingham, at a certain day then

(y) 1 Hawk. P. C. c. 70. s. 11.

(z) 2 East. P. C. c. 19. s. 7. p. 859.

(a) 2 East. P. C. c. 19. s. 7. p. 859. And as to the distinction between forgery and cheats, see *ante*,

291, note (r).

(b) 2 East. P. C. c. 19. s. 7. p. 860.

(c) *Id. Ibid.*

(d) 3 Bac. Ab. *Forg.* (B).

(e) East. P. C. c. 19. s. 7. p. 861.

past, wickedly contriving and intending the said Duke of the said alum to deceive and defraud, and with a wicked and fraudulent intent to avoid the delivery of the said alum on, &c. at, &c. with force and arms, upon the back of a certain certificate in writing, signed by one A. N., falsely forged and counterfeited, and caused to be forged and counterfeited, a certain writing in the words and figures following:—

“ Schedule {	Tons C.	} “ Mr. John Ward. I do hereby or-		
	660 5		} “ der you to charge the quantity of	
	315 5			} “ 660 tons and 1 quarter of alum, to
	— —			
975 10	} “ here mentioned in this certificate;			

“ and out of the money arising by the sale of the alum in your hands pay to Mr. W. Ward and yourself 10*l.* for every ton according to agreement; and for your so doing this shall be your discharge.—Buckingham.—*April 30th, 1706* ;” to the evil example, &c. to the great damage of the said duke, and against the peace, &c. And it charged in a second count, that he published the same forged writing, knowing it to be forged, &c. The defendant having been convicted, it was moved in arrest of judgment, that the instrument set forth was not the subject of forgery at common law, and that the offence was not, therefore, punishable in this form, but at most punishable only as a cheat; being merely a thing of a private nature, and in effect nothing more than a letter. And it was argued that if the counterfeiting of a letter had been punishable as a forgery at common law, then the making of the statute 33 Hen. 8. c. 1. to punish those who got the money or goods of others under colour of false tokens, or counterfeit letters was nugatory. It was also urged, that it no where appeared that the duke of Buckingham had been prejudiced by this; which might have been indictable as a cheat, if he had been so prejudiced; though not as for forgery at common law. But all the court held that this was indictable as a forgery at common law. That none of the books confine the offence to the particular kinds mentioned in 3 Inst. 169; and that as forging a writing not sealed came within all the mischief of forging a deed, the maxim applied, *ubi eadem est ratio eadem est lex*. That this was recognised in the preamble of the stat. 5 Eliz. c. 14. which recites that the forging of *writings*, as well as of *deeds*, was punishable by law before that statute; but that offenders had been encouraged by the too great mildness of the punishments; and that the stat. 33 Hen. 8. c. 1. did not create new-offences, but only enhanced the penalty where the fraud was executed. (f)

In the argument upon this case, the following instances of indictments at common law, for forging instruments not under seal, were referred to by the counsel for the crown, and relied upon by the court; an indictment for forging letters of credit to raise money, (g) for forging a bill of exchange or a promissory note, (h) a

and to appropriate part of the proceeds to the defendant's own use, with intent to defraud, &c. No fraud was effected; but it was holden that this was forgery.

(f) Ward's case, Hil. 13 Geo. 1. 2 Str. 747. 2 Lord Raym. 1461. 2 East. P. C. c. 19. s. 7. p. 861.

(g) Savage's case, Str. 12.

(h) Sheldon's case, Hil. 34 Car. 2. Rot. 35, Rex v. Ward, (a brother of the present defendant) Mich. 6 Geo. 1.

bill of lading, (i) an acquittance, (k) a warrant of attorney, (l) a marriage register, (m) a protection from a member of parliament, (n) with several other cases. (o) And the offence of forgery was distinguished from cheats at common law and upon the statute 33 Hen. 8. c. 1. where the party received an actual prejudice, which was considered not to be necessary to constitute forgery, in which it was sufficient if the party might be thereby prejudiced. (p)

Fawcett's case. The defendant having been committed to gaol under an attachment for a contempt in a civil cause, counterfeited a pretended discharge as from his creditor to the sheriff and gaoler under which he obtained his discharge from gaol; and it was holden to be a misdemeanor at common law; although as the attachment was not for the non-payment of money, the order was in itself a mere nullity, and no warrant to the sheriff for the discharge. A majority of the Judges also thought that it was a forgery at common law.

In a subsequent case, Leander Fawcett, who had been committed to the gaol at York, under an attachment, sued out of the Court of King's Bench, for a contempt in a civil suit, was indicted for forging a certain writing, purporting to be signed in the name of A. Dawson, (the party who had prosecuted the writ of attachment against him) and to contain the authority of Dawson to the sheriff for his discharge, in the following form.—“To the high sheriff of the county of York, his deputy, &c. and gaoler.—As to any writ, attachment, or any other process or cause whatsoever, at the suit instance or promotion of me A. Dawson, by reason whereof Leander Fawcett is now detained a prisoner in your custody, you may forthwith discharge and set at liberty him the said Leander Fawcett unless detained at the suit of some other person; and for so doing this shall be your warrant and indemnity. (Dated) 26th Feby. 1793. (Signed) A. Dawson, and witnessed by one R. W.” The defendant having been convicted, several questions were submitted to the consideration of the Judges; and, amongst others, whether the order were a matter of such a public nature, that the counterfeiting of it would be a forgery at common law; and also, whether, as the attachment was not for non-payment of money, the order, if genuine, would not have been a mere nullity, and the sheriff not authorised to discharge the prisoner under it. Lord Kenyon, C. J. and Eyre, C. J. said, that there was an injury to a third person, and that it was an interruption to public justice: but the latter thought it was not a forgery, but a cheat. The matter was adjourned to a subsequent term, when Eyre, C. J. was still not satisfied as to the forgery; though he thought the indictment good as for a cheat. But all the Judges concurred in holding that the offence was indictable as for a misdemeanor at common law; and a great majority also thought it was forgery at common law. (q)

(i) *Stocker's case*, 5 Mod. 137. 1 Salk. 342. The court held the indictment ill for uncertainty; but not because the offence was not forgery at common law.

(k) *Rex v. Ferrers*, 1 Sid. 278. and the record is in *Trem. Entr.* 129.

(l) *Farr's case*, T. Raym. 81.

(m) *Dudley's case*, 2 Sid. 71. 3 Leon. 170.

(n) *Deakin's case*, 1 Sid. 142. *ante*, 338.

(o) See 2 East. P. C. c. 19. s. 7. p. 862, note (g) where *Rex v. Hales* and *Kinnersley*, 9 St. Tr. 77. *ibid.* 93. *Rex*

v. Gibson, 1 Sess. Cas. 428. and *ibid.* 432. are referred to, as relating to promissory notes, and indorsements; and a reference is made upon the subject in general to 13 Vin. Ab. 460. *Trem. P. C.* 100. 2 Show. 20. *Obrian's case*, 7 Mod. 378. 2 Sess. Cas. 306. 2 Str. 1144.

(p) 2 East. P. C. c. 19. s. 7. p. 862. And see *Wilcox's case*, Russ. & Ry. 50., where a doubt was entertained whether the offence came under the denomination of a forgery at common law.

(q) *Fawcett's case*, *York Spr. Ass.*

SECTION III.

Of the Fraud and Deceit to the Prejudice of Another's Right.

With respect to the *fraud and deceit*, to the prejudice of another's right, it should always be kept in mind, that though in cases of forgery, properly so called, it is, as we have seen, (r) immaterial whether any person be actually injured or not, provided he *may be* thereby prejudiced, yet the fraud and intention to deceive constitute the chief ingredients of this offence. Thus Buller, J. speaks of it as the making a false instrument "with intent to deceive;" (s) and Eyre, B., as a false signature made, "with intent to deceive." (t) And it is observed, that in the word "deceive" must doubtless be intended to be included an intent to defraud; (u) and that the offence was accordingly defined by Grose, J., as the false making a note or other instrument "with intent to defraud." (x) Eyre, B., also in another case defined the offence to be the false making an instrument which purports on the face of it to be good and valid, for the purposes for which it was created "with a design to defraud." (y) And it has been argued, that it is no answer to a charge of forgery to say that there was no special intent to defraud any particular person, because a *general intent to defraud* is sufficient to constitute the crime; for if a person do an act the *probable* consequence of which is to defraud, it will, in contemplation of law, constitute a fraudulent intent. (z) And it has been holden, that in an indictment for forgery, it is sufficient to aver a general intent to defraud a certain person, which intention may be made out by the facts in evidence at the trial. (a)

Of the fraud and deceit to the prejudice of another's right.

Intent to defraud.

Forging a bill of exchange payable to the prisoner's own order, and uttering it without indorsement as a security for a debt was holden to be a complete offence. (b)

The offence of disposing of and putting away forged bank notes was holden to be complete, though the person to whom they were

1793, and East. T. 1793. 2 East. P. C. c. 19. s. 7. p. 862. And see the note (a), in which the learned writer says, that Mr. Justice Buller's MS. only made a quære as to the opinion of Eyre, C. J.; but that it appeared from other MSS. as well as Mr. Justice Buller's, that the Judges all concurred to sustain the conviction on the general ground only before mentioned.

(r) Ward's case, *ante*, 350.

(s) Cougan's case, 1787. 2 East. P. C. c. 19. s. 1. p. 853. and s. 43. p. 948. *Ante*, 339.

(t) Taylor's case, 1779. 2 East. P. C. c. 19. s. 1. p. 853. and s. 47. p. 960.

(u) 2 East. P. C. c. 19. s. 1. p. 853.

(x) *Rex v. Parkes and Brown*, 1797. 2 East. P. C. c. 19. s. 1. p. 853.

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and s. 49. p. 963. 2 Leach 775.

(y) *Rex v. Jones and Palmer*, 1785. 2 Leach 367.

(z) By Shepherd *arguend.* in *Tatlock v. Harris*, 3 T. R. 176. and it is observed in 1 Leach 216, note (a), that this doctrine was seemingly adopted by the court.

(a) Powell's case, 1 Leach 77. It is observed, however, that in *Rex v. Bigg*, 3 P. Wms. 419, it was holden not to be an objection to a special verdict that the forgery was not found to have been committed for the sake of lucre, or to defraud the party. 2 East. P. C. c. 19. s. 3. p. 854.

(b) *Rex v. Birkett, Russ. & Ry.* 86. *post.*

disposed of was an agent for the bank to detect utterers, and applied to the prisoner to purchase forged notes, and had them delivered to him as forged notes for the purpose of disposing of them. The Judges held that if the prisoner put the notes off with intent to defraud, the intent existing in the mind was the essence of the crime, although, from circumstances of which he was not apprised, he could not in fact defraud the prosecutor. (c)

Uttering a forged stock receipt to a person who employed the prisoner to buy stock to the amount therein specified, and had advanced the money, was held to be sufficient evidence of an intent to defraud that person; and it was also holden that the oath of the person to whom the receipt was uttered, that he believed the prisoner had no such intent, did not repel the presumption of an intent to defraud. (d)

It has been holden that the jury ought to infer an intent to defraud the person who would have to pay the instrument if it were genuine, although from the manner of executing the forgery or from that person's ordinary caution it would not be likely to impose upon him, and although the object was general to defraud whoever might take the instrument, and the intention of defrauding, in particular, the person who would have to pay the instrument, if genuine, did not enter into the prisoner's contemplation. (e)

Forgery consists in the endeavouring to give an appearance of truth to a mere deceit and falsity.

It is said by Hawkins that the notion of forgery does not seem so much to consist in the counterfeiting of a man's hand and seal, which may often be done innocently; but in the endeavouring to give an appearance of truth to a mere deceit and falsity, and either to impose that upon the world as the solemn act of another, which he is no way privy to, or at least to make a man's own act appear to have been done at a time when it was not done, and by force of such a falsity to give it an operation which in truth and justice it ought not to have. (f)

But as the fraud and intention to deceive, by imposing upon the world that as the act of another which he never consented to, are the chief ingredients which constitute this offence, so it hath been holden, that he who writes a deed in another's name, and seals it in his presence, and by his command, is not guilty of forgery, because the law looks upon this as the other's hand and sealing, being done by his approbation and command. (g)

So, if a man writes a will for another without any directions from him, and he for whom it is written becomes *non compos* before it is brought to him, it is not forgery; for it is not the bare writing of an instrument in another's name without his privity, but the giving it a false appearance of having been executed by him, which makes a man guilty of forgery. (h) Also he cannot be

(c) *Rex v. Holden*, Russ. & Ry. 154. and it was holden that the indictment need not state to whom the note was disposed of, it being sufficient to state that the prisoner disposed of the note with intent to defraud the bank, he knowing it at the time to be forged.

(d) *Rex v. Sheppard*, Russ. & Ry. 169.

(e) *Rex v. Mazagora*, Russ. & Ry. 291.

(f) 1 Hawk. P. C. c. 70. s. 2.

(g) 1 Hawk. P. C. c. 70. s. 3. and 3 Bac. Ab. *Forg.* (A).

(h) *Moor* 760. 1 Hawk. P. C. c. 70. s. 5. 3 Bac. Ab. *Forg.* (A).

punished as guilty of forgery who rases the word *libris* out of a bond made to himself, and substitutes *marcis*, because here is no appearance of a fraudulent design to cheat another, and the alteration is prejudicial to none but to him who makes it, whose security for his money is wholly avoided by it; yet this it seems would be forgery if by the circumstances of the case it should in any way appear to have been done with any view of gaining an advantage to the party himself, or of prejudicing a third person: and it is holden, that such an alteration, even without these circumstances, is a misdemeanor; though it do not amount to forgery.⁽ⁱ⁾ So that it is well observed, that at any rate it is very dangerous to tamper in these matters. ^(k)

SECTION IV.

Of Principals and Accessories.

It has been stated in a former part of this work, that it is laid down generally in the books, that all are *principals* in forgery; and that whatever would make a man accessory before the fact in felony, would make him a principal in forgery: but that it is conceived, this must be understood of forgery at common law, and where it is considered only as a misdemeanor. ^(l) And with respect to a case ^(m) upon the statute 5 Eliz. c. 14. which would seem to lead to a contrary conclusion, it is elsewhere observed that, from its circumstances, there seems no reason for taking that case out of the general rule, that when a statute makes a new felony, it incidentally and necessarily draws after it all the concomitants of felony, namely, accessories before and after. ⁽ⁿ⁾ And this doctrine is confirmed by several cases.

Of principals and accessories.

Three prisoners, Samuel Soares, William Atkinson, and John Brighton, were charged by the indictment with feloniously uttering and publishing as true a certain false, forged, and counterfeit bank note for 5*l.* knowing it to be forged, &c. with intent to defraud the governor and company of the Bank of England. And the indictment also contained the other usual counts, for forging, and for disposing of and putting away the note, with the like intent; together with counts stating the intent to be, to defraud the person to whom it was offered in payment. It was proved that the prisoner, Brighton, offered the note in question in payment for a pair of gaiters at a shop in *Gosport*, and that the other two prisoners, Soares and Atkinson, were not with Brighton at the time he so offered the note, but were waiting at *Portsmouth*

Soares, Atkinson, and Brighton's case. Where it appeared that two of the prisoners were privy to the uttering of a forged note by previous concert with the other prisoner who actually uttered it; but that they were not present at

⁽ⁱ⁾ 1 Hawk. P. C. c. 70. s. 4. 3 Bac. Ab. *Forg.* (A).

^(k) 2 East. P. C. c. 19. s. 3. p. 854.

^(l) *Ante*, Vol. I. p. 31, 32.

^(m) Bothe's case, Moor 666. *Ante*, Vol. I. p. 32, note ^(d).

⁽ⁿ⁾ 2 East. P. C. c. 19. s. 52. p. 973, 974. And see *ante*, Vol. I. p. 32, *et sequ.*

the fact of the uttering, it was holden that they were accessories before the fact, and were therefore entitled to an acquittal on an indictment charging them as principals.

till he should return to them, it having been previously concerted *between the three prisoners* that Brighton should go over the water from *Portsmouth* to *Gosport*, for the purpose of passing the note, and when he had passed it, should return to join the other two prisoners at *Portsmouth*; they all three *knowing* that it was a forged note, and having been concerned together in putting off another note of the same sort, and in sharing the produce among them. Upon this evidence, the counsel for the prisoners Soares and Atkinson objected, on their behalf, that they were not guilty of the charge made against them in this indictment, not having been present at the time the other prisoner uttered the note, nor so near as to be able to aid and assist him; and that they could be charged only as accessories before the fact. The jury found that the forged note was uttered by the prisoner Brighton, in concert with the other two prisoners, and found them all three guilty. The prisoner Brighton was left for execution: but judgment was respited as to the other two, whose case was referred to the consideration of the Judges, who had no doubt that they were entitled to an acquittal on this indictment charging them as principals, they not being present at the time of the uttering, or so near as to be able to afford any assistance to the accomplice who actually uttered the note. The prosecutor was, therefore, required to state on what grounds the contrary was meant to be argued; and no suggestion of the kind being made, the two prisoners were recommended for a pardon. (j)

Constructive presence.

So in a late case at the Old Bailey, Graham, B., is reported to have said, "It has frequently been held that what would amount to a constructive presence at common law will not be sufficient upon an indictment under a statute. A case under this statute occurred before me at Derby. Two persons went in concert to utter a forged note; one went into a shop to utter it, whilst the other remained at *some little distance in the street*; it was objected that the latter was not liable as a principal. I saved the point; and the Judges were of opinion that the utterer only was liable." (k)

The case referred to by the learned Judge was probably that of *Rex v. Davis and Hall*, tried not at Derby but at the Lent Assises for Nottingham, in the year 1806, and in which it was holden not to be sufficient, to make a person a principal in uttering a forged note, to prove that such person came with the utterer to the town in which it was uttered, went out with him from the inn at which they had put up a little before the time when it was uttered, joined him again in the street a little after the uttering, and at some little distance from the place of the uttering, and ran away when the utterer was apprehended. (l)

(j) *Rex v. Soares, Atkinson, and Brighton*, East. T. 1802, 2 East. P. C. c. 19. s. 52. p. 974. Russ. & Ry. 25. And see *Rex v. Badcock and others*, Trin. T. 1813, Russ. & Ry. 249., and *Rex v. Stewart and Dickens*, East. T. 1818, Russ. & Ry. 362.

(k) By Graham, B., in the case of *Brady and others*, for forging and ut-

tering a check, O. B. June 1813, 1 Stark. Crim. Plead. 80, in the note. But see upon this subject *ante*, Vol. I. p. 22, *et sequ.*

(l) *Rex v. Davis and Hall*, cor. Graham, B., *Nottingham Lent Ass.* 1806. and East. T. 1806. Russ. & Ry. 113.

But it has been holden that where several persons were in combination, and jointly co-operated in making forged Bank of England notes, they were all guilty as principals, though each of them executed by himself a distinct part of the forgery, and though one of them was not present when the notes were completed by the signature. (*m*)

Constructive presence in the actual forgery.

In the following case a wife was indicted as a principal in a forgery on the statute 49 Geo. 3. c. 123. s. 13. and her husband as an accessory before the fact at common law.

The indictment charged the prisoner, Sarah Morris, with forging an order and certificate for receiving prize-money, which had become due to one Henry Taylor, a petty officer in the naval service, with intent to defraud the commissioners of Greenwich Hospital; and the prisoner, John Morris, with inciting, counselling, aiding, procuring, &c. the said Sarah Morris to commit the said felony. The second count charged Sarah Morris with having knowingly uttered the order and the certificate by the incitement of John Morris. And there were many other counts in which the offence was charged with some variations. It appeared in evidence that Henry Taylor, whose name purported to be subscribed to the order, was, in the year 1811, a petty officer on board his Majesty's frigate the *Frederickstein*; and in such capacity became entitled to a share of certain prize-money arising from the capture of a rich vessel. In the month of November, 1813, the prisoner, Sarah Morris, who was the wife of the other prisoner, John Morris, and real or pretended daughter of Henry Taylor, applied to a clerk in the cheque office, in Greenwich Hospital, for the payment of the prize-money due to Henry Taylor; and produced at the same time the order stated in the indictment. She was desired to call again, in about ten days, and went away, leaving the order with the clerk. But in about four or five days she came again, and expressed great anxiety to be immediately paid the money, when she was told that the money had not yet come in; and the order was given back to her with a request that she would not apply again until she was duly informed that the money had been remitted to the office. Almost immediately after this second visit the other prisoner, John Morris, wrote a letter to the clerk of the cheque on the subject. On the 8th December, notice was given to Sarah Morris that the prize-money was come in, and that she might receive the share of it to which Henry Taylor was entitled; upon which she went to the office with the same order and certificate, which she produced; and had nearly obtained the warrant for the payment of the money, when circumstances occurred which caused suspicion, and she and her husband were shortly afterwards apprehended. It was also proved that Henry Taylor, whose name purported to be signed to the order, could not write, and was obliged always to make a mark whenever his signature was required; and that the name of the officer, by whom the certificate purported to be subscribed, was not his hand-writing. The landlord of the house in which the prisoners lodged stated that the prisoner, John Morris, had, in

Morris's case. Where a wife, by the incitement of her husband, but in his absence, knowingly uttered a forged order and certificate for the receiving of prize-money, it was holden that they might be indicted together; the wife as a principal on the statute 49 Geo. 3. c. 123.; and the husband as an accessory before the fact at common law.

two or three instances, ordered his wife, Sarah Morris, to go to Greenwich Hospital respecting about 30*l.* of prize-money, due to Henry Taylor, his wife's father; that he was constantly talking of having been Henry Taylor's shipmate; that, at one time, Sarah Morris told her husband that she had been to Greenwich; that the prize-money was not then ready; that the office had not yet received it; and that he, the witness, had lent the prisoner, John Morris, money, upon a belief that he had prize-money to receive. He also swore that he really believed that Sarah Morris went to receive it in obedience to her husband's orders. And, as to this fact, it was proved that the prisoner, John Morris, had signed a paper, stating that his wife had acted in this business entirely under his orders and directions. It was also proved by a witness who had formerly been a captain's clerk in the navy, that in the month of November, 1813, the prisoner, John Morris, represented to him that there was about 30*l.* prize-money due to his father-in-law, Henry Taylor, as a caulker in the Frederickstein frigate; that he did not like to go to a Jew upon the subject; and that he would be obliged to him if he would fill up the blanks in certain papers which he produced; that the witness accordingly filled up the blanks, excepting the signatures; and that, on observing there was a spare half sheet to the papers he so filled up, he advised the prisoner, John Morris, to send it by the post to his father-in-law; but that he replied that his wife was going to Portsmouth, on board the *Gladiator*, and that she would get it done. This witness further stated that he afterwards met the prisoner, John Morris, who then told him that he had got the papers regularly signed by Henry Taylor and the captain: and that he was going to send his wife to Greenwich Hospital for the money. Upon this evidence it was submitted by the counsel for the prisoners, that as Sarah Morris, in the part she took in this transaction, had clearly acted under the directions and coercion of her husband, she could not be found guilty; (*n*) and that if she was innocent as a principal, the other prisoner could not be guilty as an accessory. And the jury having found both the prisoners guilty, the case was reserved for the consideration of the twelve Judges; who were unanimously of opinion that the prisoner, Sarah Morris, was guilty of uttering the forged instrument, knowing it to be forged; and that the prisoner, John Morris, her husband, was guilty of the offence with which he was charged in the indictment, namely, that of an accessory before the fact at common law. (*o*)

Of causing,
assenting, and
consenting.

It is said by Lord Coke, that to *cause* is to procure or counsel one to forge; to *assent*, is to give his assent or agreement afterwards to the procurement or counsel of another; to *consent* is to agree at the time of the procurement or counsel, and he in law is a procurer. (*p*) But it is observed, that the *assent* here men-

(*n*) *Ante*, Vol. I. p. 15, 18.

(*o*) *Rex v. Morris*, East. T. 1814.
2 Leach 1096. Russ. & Ry. 270.
And see *Rex v. Martha Hughes*, *ante*,
Vol. I. p. 17.

(*p*) 3 Inst. 169. And in a strict sense he that *causes* a forgery to be done is a forger himself; but then it ought to be so laid in the indictment. *Per Cur.* in *Rex v. Stocker*, 5 Mod. 138.

tioned must be understood of an assent to the design of forging, before the fact of the forgery committed; (g) since, according to Lord Hale, an assent after the fact committed makes not the party assenting guilty or principal in the forging; but it must be a precedent or concomitant assent. (r)

By the general provisions of the 7 Geo. 4. c. 64. s. 9, 10. accessories before the fact may be tried as such, or for a substantive felony; and all accessories may be tried by any Court which has jurisdiction to try the principal felon, although the offence may have been committed on the seas or abroad; and if the offences have been committed in different counties, the accessories may be tried in either. (s)

Trial of accessories.

SECTION V.

Of the Indictment, Trial, Evidence, and Punishment.

It now remains, in conclusion of this Chapter, to mention some of the points of general application concerning the indictment, trial, evidence, and punishment in cases of forgery.

Of the indictment, trial, &c.

It is usual to charge in the indictment that the party *falsely* forged and counterfeited, &c.: but it is said to be enough to allege only that he *forged and counterfeited* without adding *falsely*, which is sufficiently implied in either of those terms, particularly in the word to *forge*, which is always taken in an evil sense in our law. (t) It has been holden that an indictment is good, and not repugnant, although it state that the party *falsely* forged a *false* writing. (u)

Of the indictment. Word "*falsely*."

It is essentially necessary to an indictment for forgery, that the instrument alleged to be forged, should be set forth in words and figures; (x) though, in general, figures must not be used in an indictment. (y) In a case where, upon an indictment for forging a receipt for money, it was objected that in the receipt, as set forth, some of the sums were in figures, it was holden that the receipt must be pursued exactly, or it would be a variance. (z) The reason for setting out the instrument is, that the Court may see that it is one of those instruments the falsely making or knowingly uttering of which the law has said shall be considered

The forged instrument must be set forth in words and figures.

(g) 2 East. P. C. c. 19. s. 52. p. 973.

(r) 1 Hale 684.

(s) See the statute, *Addend.* to the 1st vol.

(t) 2 East. P. C. c. 19. s. 57. p. 985. *Savage's case*, Str. 12. The Latin words were *fabricavit et contrafecit*. *Mariot's case*, 2 Lev. 221. *Dawson's case*, 1 Str. 19.

(u) *Rex v. Goate*, 1 Lord Raym.

737.

(x) 2 East. P. C. c. 19. s. 53. p. 975. *Mason's case*, *Northumberland Sum. Ass.* 1792. Mich. T. 1792. East. T. 1793. Trin. T. 1793. 2 East. P. C. *ibid.*

(y) 1 Chit. Crim. L. 176.

(z) *Powell's case*, 2 East. P. C. c. 19. s. 53. p. 976.

forgery. (a) And in a case of forgery at common law, the indictment was holden to be bad in form, as it did not state what the instrument was in respect of which the forgery was committed, nor how the party signing it had authority to sign it. (b)

If it be in a foreign language there must be an English translation.

As the object of setting out the instrument is, that the Court may see, and be able to form an opinion whether it be that which it is alleged to be, and whether it falls within the act or law on which the prosecution is founded, judgment was arrested upon an indictment for forging a *Prussian* treasury note, on the ground that the indictment did not contain any English translation of the note, which was in foreign language. (c)

The recital of the instrument is usually prefaced by the words, "to the tenor following, that is to say," &c. or "in the words "and figures following," which imports an exact copy. But where the indictment was for forging a certain receipt for money, "as follows," and then set forth the receipt in words and figures, all the Judges held that the words, "as follows," were to be taken as the same as, "as according to the tenor following," or "in the "words and figures following;" and that if the prosecutor had failed in evidence in proving the receipt verbatim as laid, it would have been a fatal variance. (d) Therefore, though there be no technical form of words for expressing that the instrument is set forth in words and figures, it is clear that the prosecutor cannot, by varying the terms in which he introduces the instrument, relieve himself from any accuracy which is otherwise requisite. (e)

A literal variance will not vitiate.

But in setting forth the tenor of the instrument, a mere literal variance will not vitiate the indictment. Thus where, upon an indictment which charged the prisoner with forging a bill of exchange, and contained, in the bill set forth, the words "value *received*," and the bill produced in evidence, though otherwise corresponding with that set forth, was written "value *receivd*," it was holden that the variance was not material, as it did not change the word. (f) So where the prisoner was indicted for uttering a bill of exchange, directed to Messrs. Masterman, Peters, & Co., with a forged indorsement thereon; and it was objected that there was a variance in the indictment, which imported to set out the bill according to its tenor, inasmuch as the letter *r* in Messrs. was omitted, and the abbreviation Mess^r. might stand for words which Messrs. could not; the objection was overruled; and the Judges, upon the point being referred to them, held that the indictment was sufficient. (g) But, if by addition, omission, or alteration, the word is so changed as to become another word, the variance will be fatal. (h)

(a) *Lyon's case*, 2 Leach 597, 608.

(b) *Rex v. Wilcox*, Russ. & Ry. 50.

(c) *Rex v. Goldstein*, Russ. & Ry. 473.

(d) *Powell's case*, 2 Black. R. 787. 1 Leach 77. 2 East. P. C. c. 19. s. 53. p. 976. in which last book the learned writer says, that he cannot but question *Smith's case*, Salk. 342. where it is said in the report that where a deed with the mark I. S. was forged, the

indictment need not set out the mark.

(e) 3 Chit. Crim. L. 1040.

(f) *Hart's case*, *Worcester Lent Ass.* 1776, and before the Judges, June 7th, 1776, 1 Leach 145. 2 East. P. C. c. 19. s. 54. p. 977.

(g) *Oldfield's case*, cor. Bayley, J., *Durham Sum. Ass.* 1811. MS.

(h) *Rex v. Bear*, Carth. 408. *Reg. v. Drake*, Salk. 661. 1 Stark. Crim. Plead. p. 242. 1 Chit. Crim. L. p.

In a case where the note charged to be forged set forth the *attestation* of the witness, and the words "Mary Wallace, her mark;" and it appeared that when the prisoner subscribed the note those parts of it were not written, it was doubted whether the prisoner had not in fact forged a note differing in the tenor of it from that set forth in the indictment. But it was holden upon consultation that the indictment was in this respect well proved. (*i*)

It is sufficient (except in the cases which will be presently mentioned) to charge that the defendant forged such an instrument, naming it, and setting forth the tenor; but the laying it to be a paper writing, &c., purporting to be such an instrument (as the statute on which the indictment is framed describes) is good; and it is said that in strictness of language there may be more propriety in so laying it, considering that the purpose of the indictment is to disaffirm the reality of the instrument. (*k*) In a case where the prisoners had been convicted upon an indictment, charging them with publishing "as a true will a certain false, forged, and counterfeited paper writing, *purporting to be the last will* of Sir A. C., &c.;" and setting out the tenor of the will, it was objected that it ought to have been laid that they forged a *certain will*, and not a paper writing, *purporting to be the last will, &c.*, as the words of the statute are "shall forge a will." But, after a variety of precedents being produced, all the Judges held it to be good either way. And it was also holden that as the will was set forth in *hæc verba*, and three names appeared as witnesses, it was sufficient, without stating that it purported to be attested by three witnesses. (*l*)

Of laying it to be a paper writing *purporting to be* such an instrument, &c.

In a case where the prisoner was indicted for forging, and knowingly uttering a bill of exchange, which was described in the indictment to be "a certain bill of exchange requiring certain persons by the name and description of Messrs. Down, &c. twenty days after date to pay to the order of R. Thomson, the sum of 315*l.* value received; and signed by Henry Hutchinson, for T. G., T. and H. Hutchinson; which bill of exchange so falsely made and counterfeited, is as follows, (setting out the bill), &c. with intent to defraud G. Hutchinson, &c.;" and it appeared on the evidence that the signature to the bill, "Henry Hutchinson," was a forgery; it was objected that the indictment averring it to have been *signed by him*, (and not merely that it *purported to have been signed by him*), which was a substantial allegation, was dis-

Carter's case. Where the signature to a bill of exchange was a forgery, it was holden that an indictment averring it to be signed by H. H. instead of stating that it *purported to have been signed by him*, was bad.

294. And in *Rex v. Beach*, Cowp. 229. where it was holden that in an indictment for forgery, a variance in writing the word *understood* instead of *understood* was not material, Lord Mansfield said, "The true distinction seems to be taken in *Reg. v. Drake*, which is this, that where the omission or addition of a letter does not change the word so as to make it another word, the variance is not material."

(*i*) *Dunn's case*, O. B. 1765. 2 East. P. C. c. 19. s. 53. p. 976. It appears that the Recorder at first entertained

the doubt, which was removed on consultation with Perrott, B., and Aston, J.

(*k*) 2 East. P. C. c. 19. s. 56. p. 980.

(*l*) *Rex v. Birch and Martin*, 1771. 2 Black. R. 790. 1 Leach 79. 2 East. P. C. c. 19. s. 56. p. 980. There was a third objection also that the indictment only averred, "they knowing it to be forged, &c." whereas it should have been that "they and each of them, knowing," &c., but it was over-ruled. The prisoners were executed.

proved. And the Judges were of that opinion, upon the case being referred to their consideration after the conviction of the prisoner. (m)

If the instrument do not purport on the face of it to be the thing prohibited to be forged, the purport must be expressly averred.

But the setting out the very subject matter which has been forged, will not, in all cases, be sufficient. For if the instrument do not purport, on the face of it, and without reference to some other subject matter, to be the thing prohibited to be forged, the purport and meaning of the forgery, with relation to such other subject matter, must be expressly averred to be the thing so prohibited. So that where the indictment charged the prisoner with forging a receipt to an assignment of a certain sum in a navy bill and the tenor of the receipt as set forth merely consisted of the signature of the party, it was holden to be defective; on the ground that the mere signing of such name, unless connected with the previous matter, did not purport on the face of it to be a receipt; and that it ought to have been averred that such navy bill, &c. together with such signature, did purport to be, and was a receipt, &c.; and that the prisoner feloniously forged the same. (n) But where a forged receipt, as set forth in the indictment, was in this form "18th March, 1773, Received the contents above by me Stephen Withers," and it appeared in evidence that such receipt was forged at the bottom of a certain account; upon objection taken that the account itself should have been set forth in order to make it appear that the receipt, as stated, was a receipt for money, all the Judges held that the indictment was sufficient; and that the account was only evidence to make out the charge as stated in the indictment. (o) It is observed upon this case that by the very terms of the writing itself, it purported to be a receipt for something, though not specifically for money, as it was averred to be, in order to bring it within the statute 2 Geo. 2. c. 25. (p)

A *bank post bill* cannot, in an indictment for forging or uttering, be described as a bill of exchange generally, but it may be described as a bank bill of exchange. (q)

Where the prisoner had been convicted of uttering and publishing as true, a forged promissory note, with intent to defraud one

Instrument improperly described as a promissory note.

(m) Carter's case, 1800, 2 East. P. C. c. 19. s. 56. p. 985.

(n) Hunter's case, O. B. 1794, East. T. 1796. 2 Leach 624. 2 East. P. C. c. 19. s. 36. p. 928, 929. and s. 53. p. 977.

(o) Testick's case, 1774, 2 East. P. C. c. 19. s. 36. p. 925. 1 East. R. 181. note (a).

(p) 2 East. P. C. c. 19. s. 53. p. 977. And the learned writer refers to Taylor's case, 1 Leach 215. 2 East. P. C. c. 19. s. 47. p. 960. *ante*, 330: where the prisoner was indicted for forging a receipt for 20*l.* due upon a bill of exchange in these words, "Received, W. Wilson;" and the indictment set forth the bill for 20*l.*, and averred the forging of a receipt for the *said*

sum of 20*l.*, but contained no averment that the writing forged, together with the bill, purported to be or was a receipt: and he observes that here also the forged writing in itself purported to be a receipt for something.

(q) Rex v. Birkett and Brady, Russ. & Ry. 251. The form of the instrument was, "At seven days sight I promise to pay this my *sola* bill of exchange," which is properly only a promissory note; but the 15 Geo. 2. c. 13. mentioning "bank notes, bank bills of exchange," &c. seems to give these bank post bills that denomination of bank bills of exchange as there are no other bank bills answering that description.

B. H., knowing, &c. against the statute, the indictment stated the instrument as follows, without any innuendo explanation or allegation respecting it or its contents, further than denominating and describing it as "a promissory note for the payment of money, " which is as follows :"—

Newport, Nov. 20, 1821.

£28. 15s. 0d.

Two months after date pay Mr. Bⁿ. Hobday, or order, the sum of twenty-eight pounds fifteen shillings

Value recd.

JOHN JONES.

At Messrs. Spoon & Co.
Bankers, London.

And an objection having been taken that the instrument so described, was not in law, a promissory note, the case was submitted to the Judges, who held that the instrument was a bill of exchange, and not a promissory note. (r)

But with respect to the word "purport" it should be well observed that it imports what appears *on the face of the instrument*; as a want of attention to this meaning of the word has been fatal to many indictments.

In a case where the instrument was laid in some counts of the indictment to be a *paper writing purporting to be a bank note*, it was holden that as it did not purport on the face of it to be a bank note, the counts could not be supported. (s)

In another case the bill of exchange upon which the indictment proceeded was in the following form :—

Bristol, Feb. 21st, 1792.

Forty days after date pay to Mr. Jeremiah Reading, or order, the sum of £80. for value received, and place it to the account of

JOHN WHITE.

To JOHN RING, Esq.

Berkley-street, Portman-square, London.

And the indictment charged that the prisoner, having such bill in his possession, *purporting to be signed by one John White, and to be directed to one John King, by the name and description of one John Ring, Berkley-street, &c.*, forged an acceptance in writing *purporting to be the acceptance of the said John King*. The bill, when produced, appeared to be accepted on the back of it by John King; and it was proved that when the prisoner negotiated the bill he stated that Mr. King was a gentleman living in Berkley-street, Portman-square, and a man of opulence; but in fact there was no person of that name living there. The prisoner having been found guilty, the case was submitted to the consideration of the twelve Judges, who determined that judgment ought to be arrested on the ground that the bill did not in fact *purport to be directed to one John King*, as stated in the indictment. Buller, J., in delivering the opinion of the Judges, said, "It is clear that

But the word *purport* imports what appears *on the face of the instrument*.

Jones's case.

Reading's case. Where the indictment charged that the defendant being possessed of a bill of exchange *purporting to be directed to one John King*, by the name and description of one John Ring, forged the acceptance of the said John King, it was holden to be bad, on the ground that Ring does not purport to be King.

(r) *Rex v. Hunter*, Russ. & Ry. 511.

(s) Jones's case, *ante*, 345, 346.

"where an instrument is to be set forth, the description, that it *purports* a particular fact, necessarily means that what is stated as the purport of the instrument appears on the face of the instrument itself. On the face of the bill of exchange in the present case (and the face of the bill is the only thing to be considered) nothing more appears, when we examine the averment, than that it is a bill of exchange drawn by *John White on John Ring*; therefore, when the indictment says that it was drawn on *John King*, by the name and description of *John Ring*, it is absurd and repugnant to itself; for the name and description of one thing cannot purport to be another thing. The drawer of the indictment was led into this blunder by not considering what was the original state of the bill, and what was the appearance of it after the acceptance was put on it; it seems as if he did not recollect under what terms, or by whom, a bill of exchange may be accepted. Though the bill was drawn on *John Ring*, it might have been accepted by *John King*, for a bill may be accepted by other persons than those to whom it is directed, as when it is accepted for the honor of the drawer, or of any of the indorsers." (t)

Gilchrist's case.

An indictment for forging a bill of exchange directed to *Ransom, Moreland, and Hammersley*, which stated that such bill purported to be directed to *George Lord Kinnauld, William Moreland, and Thomas Hammersley*, by the name and description of *Ransom, Moreland, and Hammersley*, was holden to be bad: on the principle that the word *purport* signifies that which appears on the face of the instrument.

In a case which occurred shortly afterwards, the prisoner was indicted for forging "*a paper writing, purporting to be an order for payment of money, dated 11th September, 1794, with the name Thomas Exon thereunto subscribed; purporting to have been signed by Thos. Exon, clerk, and to be directed to George Lord Kinnauld, Wm. Moreland, and Thos. Hammersley, of, &c. bankers and partners, by the name and description of Messrs. Ransom, Moreland, and Hammersley, for the payment of the sum of 10l., &c.: the tenor of which said false writing, &c. is as follows, viz.*

"Messrs. Ransom, Moreland, and Hammersley, please to pay to Mr. Brooks, or bearer, the sum of Ten Pounds, for
THOS. EXON.

"Sept. 11th. 1794."

with intent to defraud the said Geo. Ld. K., &c. There was a second count, for uttering it; and other counts, charging an intent to defraud other persons. An objection was made in arrest of judgment, that the direction of the bill was improperly described in the indictment; and ten of the Judges, who met to consider the case, were unanimously of opinion that the judgment should be arrested, on the ground that the word *purport* imports what appears on the face of the instrument, the apparent and not the legal import; and that the bill in question could not purport to be directed to Lord Kinnauld, because his name did

(t) Reading's case, O. B. 1793, Hil. T. 1794. 2 Leach 590. 2 East. P. C. c. 19. s. 56. p. 981. Buller, J., also said that as the opinion of the Judges proceeded merely on the informality of the record, the prisoner might be

again indicted for this offence. But no other indictment was preferred; and after remaining in custody till March, 1794, he received a free pardon, and was discharged, 2 Leach 593.

not appear upon the face of it. Buller, J., in delivering their opinion, said, "Old cases have given rise to much learning and argument on the words '*purport and tenor*,' and the books are full of distinctions as to the meaning of these words, and the necessity of using the one or the other of them in indictments where written instruments are to be stated; but among the many cases upon this subject, I can find no judicial determination that *the purport* and *the tenor* should both be stated in any case whatever. Purport means the substance of an instrument, as it appears on the face of it to every eye that reads it: tenor means an exact copy of it; and, therefore, where an instrument is stated according to its *tenor*, the *purport* of it must necessarily appear. The forms of indictments for forgery have varied, and been different from each other at different periods of time; and of late years they have been much more complicated than they were formerly; and, in my opinion, they have been, for that reason, much worse. I have seen the precedent of an indictment of forgery stating, 'the prisoner to have forged a certain false paper-writing, in the name of J. S. and others, bearing the form of a warrant of attorney, which said writing follows in these words; that is to say, &c.' setting it out *verbatim*; and if indictments for forgery were now merely to state that the prisoner 'forged a paper-writing to the tenor and effect following, &c.,' and the instrument set out appeared on the face of it to be a bond, or bill of exchange, or any other of the instruments described in the statute, I should, as at present advised, see no objection to such a form. If, in the present case, the indictment had stated that the prisoner had forged a certain paper-writing, in the name of T. Exon, (*u*) purporting to be a bill of exchange, and then set out the bill to the tenor and effect following, it would I think, have been quite enough; for the words 'purporting to be a bill of exchange,' are only necessary to shew that the instrument supposed to be forged is one of the instruments mentioned in the statute; and, in order to shew that it is one of those instruments, it cannot be necessary, under the word 'purporting,' to recite all the contents of the instrument; for an exact copy of the instrument itself being set forth, all its contents thereby appear; and the law requires an exact copy of the instrument to be inserted in the indictment, in order that the court may see that the instrument is the subject of forgery within the meaning of the statute. The blunder in the present indictment seems to have arisen from the circumstance of *Lord Kinnaird*, and *Messrs. Moreland and Hammersley* carrying on the banking business under the firm of *Messrs. Ransom, Moreland, and Hammersley*. The pleader who drew it, forgetting that it was wholly immaterial whether such a firm as *Ransom, Moreland, and Hammersley*, ever existed, or who were the persons who constituted that firm, and, conceiving it to be material that the names of the real partners interested

(u) But it would not have been good to have averred that the paper writing was signed by T. Exon; such sig-

nature being a forgery, and the paper, therefore, not in fact so signed. See *Carter's case*, *ante*, 361.

"in the business should be mentioned, has taken great pains to shew that a bill, drawn on '*Ransom, Moreland, and Hammersley*,' was drawn on '*Lord Kinnaird, Moreland, and Hammersley*;' and, in order to do that, he has averred in the indictment that the bill purports to be drawn on '*Lord Kinnaird, Moreland, and Hammersley*.' But the *purport* of an instrument, as I have already observed, is that alone which appears on the face of it; and on the face of this bill, Lord Kinnaird's name does not appear, and therefore the averment is not true." (x)

Edsall's case. The same doctrine was again acted upon in this case.

This doctrine was again acted upon in a case where the indictment charged the prisoner with forging a certain paper writing, *purporting* to be an inland bill of exchange, and to be drawn by one C. W. Wright, bearing date, *Winchester, 14th Nov. 1796*, and to be directed to *Richard Down, Henry Thornton, John Freer, and John Cornwall the younger*, bankers, London, by the name and description of Messrs. Down, Thornton, and Co. bankers, London, requiring them, ten days after date, to pay to Mr. Wm. Simmons, or order, *8l. 10s., &c.*, and then setting out the tenor, by which the bill appeared, as the fact really was, to be directed, "*Messrs. Down, Thornton, and Co.,*" bankers, London. (y)

Reeves's case. An indictment for forging a scrip receipt, signed "C. Olier;" stated that the prisoner forged the receipt "with the name C. Olier, thereunto subscribed; *purporting* to have been signed by one Christopher Olier." *Qu.* if this differs from the foregoing cases?

In a case which occurred about the same time, the indictment, which was for forging a scrip receipt, charged that the prisoner forged it "with the name C. Olier thereunto subscribed, *purporting* to have been signed by one Christopher Olier;" and it was objected that this must necessarily be bad, as C. Olier "did not, on the face of it, purport to be Christopher Olier, but might be Charles, &c." But the court thought that this case differed in some degree from the two cases cited in support of the objection, namely, Jones's case, (z) and Gilchrist's case; (a) inasmuch as the note in Jones's case did not purport to be a bank note, and, therefore, the indictment, charging that it did so purport, was bad; and in Gilchrist's case, as the name of Lord Kinnaird did not appear on the face of the bill, it could not purport to be directed to him: but that, in the present case, this scrip receipt being subscribed with the name C. Olier, and the indictment charging that it purported to be signed in the name of Christopher Olier, a cashier of the bank of England, it was not, upon the face of it, repugnant to the bill, or inconsistent with itself. (b)

Of the statement of the intent to defraud.

We have already considered the purpose of fraud and deceit, to the prejudice of another's right, which makes a part of the defini-

(x) Gilchrist's case, O. B. 1795, East. T. 1795, 2 Leach 657. 2 East. P. C. c. 19. s. 56. p. 982.

(y) Edsall's case, 1798, 2 East. P. C. c. 19. s. 56. p. 984. 2 Leach 662, note (a). In East. P. C. *ibid.* it is said that the Judges held the indictment bad, upon the authority of Gilchrist's case, though Buller, J., disapproved much of that determination; which, however, he admitted could not be distinguished from the present case.

(z) *Ante*, 345, 346.

(a) *Ante*, 364.

(b) Reeves's case, *cor.* Heath and Lawrence, J., and Thomson, B., O. B. 1798, 2 Leach 808, 814. 2 East. P. C. c. 19. s. 56. p. 984. The point was saved for the consideration of the twelve Judges: but it does not appear what their opinion was, there being other objections to the conviction of the prisoner; who was afterwards tried and capitally convicted on another indictment pending for the same offence.

tion of forgery. (c) Such purpose or intent to defraud must be stated in the indictment, and pointed at the particular person or persons against whom it is meditated. (d)

In stating this intent to defraud, it will be sufficient to describe the party intended to be defrauded with reasonable certainty.

Accordingly, where after conviction a motion was made in arrest of judgment, that the indictment charged the forged order as being drawn on *Messrs. Drummond and Company, Charing Cross*, by the name of *Mr. Drummond, Charing Cross*, (e) instead of mentioning the names of the respective partners, which ought to have been inserted in the place of the short description *Drummond and Company*, all the Judges held, upon a conference, that the indictment was good. They were of opinion that, if the words, "*Messrs. Drummond and Company, Charing Cross*," when taken together, had been so senseless and unintelligible as not to import a certain description of persons, the indictment would have been bad; but they said that, understanding those words as every body else did, namely, as meaning the partners in the partnership of the banking-house, they considered them as a sensible and certain pointing out of the persons intended by the draft, and as conveying with legal certainty a notification of the party intended to be defrauded. That it was not necessary in this part of the indictment to describe the party meant with more particularity; for, if any person could be intended from the words, who that person was, and whether he was the meditated object of the fraud, were matters for the consideration of the jury. (f)

Lovell's case.
An indictment which stated that a forged order was directed to *Messrs. Drummond and Company*, by the name of *Mr. D. &c.* was holden to be good; and that it was not necessary to state the names of the respective partners.

(c) *Ante*, 317, 353, *et sequ.*

(d) 2 East. P. C. c. 19. s. 58. p. 988.

(e) The order was in the following form:—

Mr. Drummond, Charing Cross,
25 August, 1782.

Please to pay the bearer, or order, on demand, £10. 10s.; and place it to account, per me,

H. H. ASTRON.

(f) *Lovell's case*, O. B. 1782. and 6th November, 1782, 1 Leach 248. 2 East. P. C. c. 19. s. 60. p. 990. It should be observed, that those counts of the indictment which stated the intent to defraud *Messrs. Drummond and Co.*, laid such intent in the concluding parts of the counts to be to defraud Robert Drummond, and the other partners in the house, *by name*. But that which Gould, J., is reported to have said, (2 East. P. C. *ibid.*), would seem to lead to the conclusion that it is not necessary to specify the names of the partners in any part of the count: viz. "That to require the 'particularising of all the partners' would be of dangerous consequence 'to such prosecutions; some of them' might not be known." A learned

writer, (after stating that there are always several counts in the indictment, charging an intent to defraud all such persons, or bodies corporate, as could be affected by the success of the forgery,) suggests that, as the intention to commit a fraud at the time of the forgery is usually general, and intended to impose rather upon the person to whom the forged instrument may be accidentally offered, (particularly in the case of bank notes, and negotiable instruments,) it would be desirable to pass an act rendering it unnecessary to state the name of any person or corporation, intended to be defrauded; 6 Ev. Col. Stat. Pt. V. Cl. xii. p. 581, 582. With respect to the statement in that part of the indictment which came in question in *Lovell's case*, it appears to have been the opinion of Buller, J., and the other Judges, that, if the words "*Messrs. Drummond and Company, Charing Cross*," had been omitted, and the indictment had only stated, according to the fact, that the bill was directed to "*Mr. Drummond, Charing Cross*," (*ante*, note (e).) it would have been sufficient. 2 East. P. C. c. 19. s. 60. p. 991. And see now 7 Geo. 4. c. 64. s. 14. as to the description of *partners*.

It is not necessary to state in the indictment the manner in which the party was to have been defrauded.

It has been holden not to be necessary to state in the indictment the manner in which the party was to have been defrauded.

Thus, where it was objected, on a motion in arrest of judgment, that it was not averred that T. Barrow, whose name appeared to be signed to the forged receipt, meant Taylor Barrow, (with intent to defraud whom the forgery was laid in one of the counts,) that the manner in which the forged receipt of stock was to operate in prejudice of Mr. Barrow ought to have been averred in the indictment, by a statement of Taylor Barrow being a proprietor of so much stock, and being personated by the prisoner, who transferred it, &c.; and that it was not sufficient merely to state that the forgery was committed with intent to defraud T. B. generally; the Judges held that it was sufficient if the offence was described in the words of the act; and that, whether it were or were not meant to defraud Taylor Barrow, was matter of evidence, which the jury had found. (g)

It need not be averred that a forged bill of exchange was tendered to the party intended to be defrauded; nor in what other manner the party could be defrauded.

And in another case, where Buller, J., upon a conference with the rest of the Judges, stated, as an objection to an indictment, that it was not alleged that the bill was uttered or tendered to the persons whom it was laid the prisoner meant to defraud; and, therefore, that it did not appear to the Court, on the face of the indictment, that those persons could be defrauded by the transaction, which *always appeared where the name of a drawer, acceptor, or indorser, was forged*; all the other Judges held that the indictment was good in this respect, as it was sufficient to pursue the words of the act, which constitute the offence; and it was matter of evidence, whether the prisoner intended to defraud the persons named by tendering the bill in payment to them, or how otherwise. (h)

As to the property of the party intended to be defrauded in the monies, &c. sought to be obtained. Jones and Palmer's case.

The following case relates to the property of the party against whom the intent to defraud is aimed, in the monies, &c. sought to be obtained by the forgery.

Two prisoners, Mary Jones and Henry Palmer, were indicted for the forgery of an indenture of apprenticeship, and also of a receipt for money, with intent to defraud A. B., C. D., &c. *the stewards of the feast of the sons of the clergy*. It appeared that the charitable fund of the sons of the clergy was raised by voluntary contributions, and allotted by the secretary equally among all the stewards, to be disposed of by them to the widows and children of deceased clergymen, according to their discretion; that the prisoner, Jones, was a clergyman's widow, and that, pretending, by means of the indentures in question, and the receipt indorsed thereon, that she had placed her son as an apprentice, she obtained, in concert with the other prisoner, an order from one of the stewards, on the treasurer of the society, for 20*l.*, as an ap-

(g) Powell's case, 1771, 2 East. P. C. c. 19. s. 59. p. 989. 1 Leach 77. In East, a further ground for the opinion of the Judges is thus stated: "Besides, there was a second count, wherein the offence was laid with intent to defraud one Sykes. If, therefore, there were no such per-

"son as Taylor Barrow, or if he had no stock; yet, as the receipt had in form the constituent parts of a receipt for the transfer of East India stock, that was sufficient."

(h) Elsworth's case, 1780, 2 East. P. C. c. 19. s. 59. p. 989., and s. 58. p. 986.

prentice-fee. The prisoners, having been found guilty, it was submitted that the offence amounted only to a misdemeanor at common law, and that this was not such a species of property as fell within any of the acts relating to forgery. But Eyre, B., said, that the several stewards were the absolute owners of their respective shares of the fund; that it was their money, put into their hands upon a trust; and if they had sunk it improperly, or paid it wrongfully, they would perhaps be answerable; and that unquestionably it was their money, as against all the world, except the subscribers. (i)

Where there is an incorporation, the money becomes the property of the whole body, and not of the individual members who compose it. And the statutes 31 Geo. 2. c. 22. s. 78. and 18 Geo. 3. c. 18. were passed to obviate the objection that the word "person" in the statutes 2 Geo. 2. c. 25. and 7 Geo. 2. c. 22. (relating to the forgery of deeds, wills, bonds, bills, &c.) did not extend to the aggregate members of a corporation. (k)

Where the persons defrauded are a corporation.

The statute 7 Geo. 4. c. 64. s. 14. in order to remove the difficulty of stating the names of all the owners of property in the case of partners and other joint owners, enacts "that in any indictment or information for any felony or misdemeanor, wherein it shall be requisite to state the ownership of any property whatsoever, whether real or personal, which shall belong to or be in the possession of more than one person, whether such persons be partners in trade, joint-tenants, parceners, or tenants in common, it shall be sufficient to name one of such persons, and to state such property to belong to the person so named, and another or others, as the case may be; and whenever, in any indictment or information for any felony or misdemeanor, it shall be necessary to mention for any purpose whatsoever any partners, joint-tenants, parceners, or tenants in common, it shall be sufficient to describe them in the manner aforesaid; and this provision shall be construed to extend to all joint stock companies and trustees."

Statement of partners, trustees, &c.

If the indictment proceeds upon a statute, the charge must, in general, be set forth (according to the established rule applicable as well to other cases as to forgery) in the very words of the statute describing the offence. (l)

Where the indictment is upon a statute, the offence must be described as in the words of the statute.

But an indictment for forging a stamp on foreign muslins, which stated the duty to be chargeable *for, on, and in respect of*, foreign muslin, was holden good; though the words of the statute in the clause imposing the duty were, *for and upon*; in other clauses, *for*; in others, *on*; and in others, *upon*. (m)

It is said that a superfluous description does not appear to be

As to a superfluous description.

(i) *Rex v. Jones and Palmer, cor. Eyre, B.*, O. B. 1785. 1 Leach 366. 2 East. P. C. c. 19. s. 60. p. 991.

(k) Harrison's case, 1777, 1 Leach 180. 2 East. P. C. c. 19. s. 59. p. 988. See the Statutes referred to, *post*. Chap. *Of the Forgery of Private Papers, &c.*

(l) 2 East. P. C. c. 19. s. 58. p. 985.

(m) *Rex v. Hall and Crutchfield*, VOL. II.

1795. 2 East. P. C. c. 19. s. 19. p. 895., and s. 58. p. 988. *post*. Chap. *Of Forgery, &c. Stamps*; and an indictment at common law was holden bad for uncertainty, which stated that the defendant forged, or caused to be forged, a bill of lading, *Rex v. Stocker*, 5 Mod. 137. 1 Salk. 342, 371.; and see Walcot's case, Holt's R. 345.

objectionable. (n) And a case is cited where, upon an indictment on the statute 2 Geo. 2. c. 25. for forging "a bond *and* writing obligatory," it was objected that, as the statute uses the term *bond* as well as the term *writing obligatory*, the indictment ought to have described the offence more particularly, either as a forgery of the one or the other; that it should have described the instrument in this case as a *writing obligatory*, as it had neither a defeasance nor penalty annexed to it; and that, although a bond were a writing obligatory, yet the converse did not hold: and by the opinion of the Judges the indictment was holden good. (o) With respect to the inference from this case that a superfluous description does not appear to be objectionable, a learned writer says that he is by no means satisfied that the term *bond* is not properly applicable to an obligation without a condition, although, for the sake of distinction, it is more usually called a single bill. (p)

The word "alter" used in the indictment, though not in the statute.

An indictment on the statute 2 Geo. 2. c. 25. which charged that the prisoner "did feloniously *alter* and cause to be altered a certain bill of exchange, *by falsely making, forging, and adding*, a cypher 0 to the letter and figure £8. &c." was holden good, though the words of the statute are "if any person shall *falsely make, forge, or counterfeit*," and the word *alter* is not used in the statute. (q)

If any part of a true instrument be altered, a forgery of the whole instrument may be laid in the indictment.

In this case the Judges held that there was no difference in substance or in the nature of the charge, whether the indictment were for feloniously altering by falsely making and forging, or for feloniously making and forging by falsely altering, &c. (r) We have already seen that if any part of a true instrument be altered, the offence may be treated as a forgery of the whole instrument, and be so laid in the indictment. (s) But it appears to have been more usual to lay forgeries of this kind by stating the particular alteration, at least in one count. (t)

Plea of *autrefois acquit*.

In a case where the prisoner was indicted for uttering a forged will, on his arraignment he pleaded *autrefois acquit*; upon which the plea was taken *ore tenus*, and recorded by the clerk of the arraigns, who replied to it, on the part of the crown, *nul tiel record*. In order to prove the plea, the record of a former acquittal of the prisoner was produced; but, on comparing it with the present indictment, it appeared that the prisoner had been acquitted of uttering a forged will, beginning "*I, James Gibson, do hereby*," &c. but that he was now indicted for uttering a forged will, beginning "*James Gibson do hereby*," &c. The question, therefore, was, whether this record was legal evidence of the prisoner having been acquitted of the *same offence*? And, after argument by the prisoner's counsel, the Court rejected the proof as insufficient; the

(n) 2 East. P. C. c. 19. s. 58. p. 985.

(o) Dunnett's case, O.B. 1792, East. T. 1793. 2 East. P. C. c. 19. s. 58. p. 985.

(p) 6 Ev. Col. Stat. Pt. V. Cl. xii. p. 581. And he refers to 2 Black. Com. 340.

(q) Elsworth's case, York Lent Ass. 1780, and before all the Judges, 12 April, 1780, 2 East. P. C. c. 19. s. 58. p. 986, 988.

(r) *Id. ibid.*

(s) *Ante*, 318, *et sequ.*

(t) 2 East. P. C. c. 19. s. 55. p. 980.

prisoner pleaded the general issue to the felony, and the jury found him guilty of the offence. (u)

The offence of forgery at common law cannot be tried at the quarter sessions, that court having no jurisdiction over it; nor can they take cognizance of it as a cheat. (v) And it has been holden in several cases that the quarter sessions have no jurisdiction in cases of forgery upon the statute 5 Eliz. c. 14. (x) Lord Kenyon, C. J., in speaking of the general jurisdiction of the quarter sessions, after deciding that the offence of soliciting a servant to steal his master's goods is cognizable by that jurisdiction, as falling within that class of offences, which being violations of the law of the land, have a tendency, as it is said, to a breach of the peace; proceeds thus,—“To this general rule there are indeed two exceptions, namely, forgery and perjury; why excepted I know not; but having been expressly so adjudged, I will not break through the rules of law.” (y)

Trial of forgery. The quarter sessions have no jurisdiction.

The trial of forgery must be had in the county where the offence is committed, as the indictment can only be preferred in that county. And as it seldom happens that direct proof can be given of the very act of forgery, difficulties have sometimes occurred, in cases where there has been no offence of uttering by the prisoner, as to what shall be deemed sufficient evidence of the fact of forging within the county laid.

Trial must be in the county where the offence is committed.

As to offences committed near the boundaries of counties, or partly in one county and partly in another, the general provision of 7 Geo. 4. c. 64. s. 12. enacts “that where any felony or misdemeanor shall be committed on the boundary or boundaries of two or more counties, or within the distance of five hundred yards of any such boundary or boundaries, or shall be begun in one county and completed in another, every such felony or misdemeanor may be dealt with, inquired of, tried, and determined, and punished, in any of the said counties in the same manner as if it had been actually and wholly committed therein.”

7 Geo. 4. c. 64. offences on the boundaries of counties, or in two counties.

And as to the trial of accessories before the fact, the same statute (s. 9.) enacts, that in case the principal felony shall have been committed within the body of any county, and the offence of counselling, procuring, &c. shall have been committed within the body of any other county, the last mentioned offence may be inquired of, tried, &c. in either of such counties. And as to accessories after the fact, the same statute (s. 10.) enacts that such accessories may be tried by any court which has jurisdiction to try

County for the trial of accessories.

(u) Coogan's case, O. B. 1787, 1 Leach 448. So in Reading's case, *ante*, 364, note (d), Buller, J., said that the judgment being arrested for the informality of the record the prisoner might be again indicted for the offence. And in Gilchrist's case, *ante*, 364, as the objection taken went only to the form of the indictment, and not to the merits of the case, the prisoner was remanded to prison till the end of the sessions, that the prosecutor might be at liberty to prefer a better indictment against him if he thought

fit. In the above case of Coogan, the prisoner's counsel chiefly relied upon Lord Hale's construction of Vaux's case, (2 Hale 246.) as reported by Lord Coke, 4 Co. 44. 3 Inst. 214.

(v) Yarrington's case, 1 Salk. 406. Rex v. Gibbs, 1 East. R. 173. 2 East. P. C. c. 19. s. 7. p. 864. 2 Hawk. P. C. c. 8. s. 64.

(x) Smith's case, Cro. Eliz. 87. Wilson's case, *Id.* 601. Hunt's case, *Id.* 697.

(y) Rex v. Higgins, 2 East. R. 18.

Parkes and Brown's case. The bare fact of a forged note being uttered in a particular county by one prisoner, is no evidence of the forgery having been committed in that county by another prisoner, though an accomplice of the utterer.

the principal felon, and that if the offences be committed in different counties, such accessories may be tried in either. (z)

Two prisoners were indicted, the one, Parkes, for forging, the other, Brown, for uttering a forged promissory note for five guineas. It appeared clearly, that Parkes had forged the note: but the only evidence offered, to shew that the forgery was committed in *Middlesex*, where the venue was laid, was that the prisoner Brown, between whom and Parkes there was a great intimacy, had uttered it in Middlesex, in the absence of Parkes, who was not proved to have been cognizant of the fact, and that above forty of the same sort of five guinea notes in blank, without any signature, were found upon Parkes, in the same county, together with a receipt, under cover addressed to Brown, for 21*l.* for four five guinea bills. It appeared, that all the notes found upon Parkes, as well as that upon which the indictment proceeded, were dated "Ringhton, Salop." Both the prisoners having been convicted, the case was referred to the consideration of the twelve Judges. Some of the Judges were of opinion, that the fact of finding the forged instrument in the county, in which also it appeared that the forger himself was, was evidence, in the absence of other proof, of the fact of the forgery having been there committed. But the majority of them, though they agreed that it was a question of evidence for the jury, were of opinion that there was no proof to warrant the conclusion that the forgery was committed by Parkes in Middlesex, where it was laid: for they thought that the bare fact of the note being uttered in Middlesex by the other prisoner, taking him even to be an accomplice, was no evidence of the forgery itself having been committed in that county. (a)

Crocker's case. The finding a forged note in the custody of a person is not evidence that it was forged in the county where it was found; especially in a case where from the circumstances there is a presumption that it was forged in another county.

In a more recent case it is reported, as the opinion of a majority of the Judges, that the finding a forged instrument in the custody of a person is no evidence that it was forged in the county where it was found. The prisoner, Benjamin Crocker, was indicted at Salisbury, in the county of *Wills*, for the forgery of the note in question. From the evidence it appeared, that the prisoner had formerly lived at Winsham, in the county of *Somerset*, where he followed the employment of a farmer for many years. About the month of June, 1804, he quitted his farm, and all his concerns at Winsham; at which place one William Tucker, in whose name the forged note purported to be signed, resided, and also carried on the farming business there, at the time of the trial. In November, 1804, the prisoner, having changed his name from Crocker to Collins, went with his wife to *Salisbury*, where he took lodgings, and continued to live until about the middle of the month of May, 1805, when he left his wife at her apartments in Salisbury, and went to London. During his stay in London, he was apprehended there on another charge; in consequence of which, his lodgings at Salisbury were searched, in the presence of his wife; he being still in London; and in a bureau belonging to the prisoner was found a pocket-book, in the inside of which was written his name, B. Crocker, in his own hand-writing; and in

(z) See the statute *Addend.* to the First Volume.

(a) *Rex v. Parkes and Brown*, 1796.

2 Leach 775. 2 East. P. C. c. 19. s. 49. p. 963, and s. 61. p. 992. *Ante*, 321.

one of the pockets of this pocket-book was found the note, set forth in the indictment, which was dated on the 7th March, 1803, and on which was an indorsement that a year's interest had been paid. It was objected upon this evidence that there was nothing to shew that any offence had been committed in the county of *Wilts*, the prisoner not having been in that county, but in *Somersetshire*, at the time when the note appeared to bear date; and the point was submitted to the consideration of the Judges. No opinion of the Judges upon the case was ever publicly delivered; but the prisoner received a pardon, and was discharged; and it is said to have been understood, that a majority of the Judges thought there was not sufficient evidence that the offence was committed in the county of *Wilts*. (b)

It was observed by the counsel who argued the last mentioned case, that in *Elliott's case* (c) the forged instrument was found upon the prisoner in *Kent*, where the indictment was laid; but that no evidence was given to prove the actual fabrication of the instrument in that county; and, on the contrary, the circumstances of the case afforded some inference that the forgery was not committed there. It appeared, that one Ryland, having struck off a quantity of notes, delivered them, together with the plates, to the prisoner, at a public house in *Fleet Ditch*. The note in question was found upon the prisoner at *Dover*, and the plate at a lodging upon *Tower-hill*; yet the objection that the evidence did not afford proof of the offence being committed in *Kent* was either overlooked or thought of no weight. (d)

Where an indictment stated the forgery to have been committed in the county of Nottingham, and it was proved to have been committed in the county of the town of Nottingham, it was holden that, although under the 38 Geo. 3. c. 52. it was triable in the county at large, the offence should have been laid in the county of the town. (e)

Offence committed in the county of a town.

In a late case, where the prisoner had been convicted at the assizes for the borough of Leicester, of forging a bill of exchange, a question was raised whether the evidence of forgery in Leicester

(b) *Crocker's case*, 1805. 2 Leach 988. 2 New Rep. 87. But *qu.* if the only point actually decided by the Judges in this case was not "that an incompetent witness had been admitted?" As to which point see *post*. 375.

(c) *Ante*, 342.

(d) In 6 Ev. Col. Stat. Pt. V. Cl. XII. the learned writer says, "I remember a case at Lancaster, in the year 1798, where a clerk of a mercantile house at Liverpool had stolen several bills, and was afterwards apprehended on board a sloop in the Downs, with a forged indorsement of the drawee on one of the bills; and Rooke, J., without any evidence to shew a greater probability of the forgery being committed in Lancashire than in any intermediate

county, thought there was enough to go to the jury; who, however, acquitted the prisoner." There certainly does not appear in this statement any thing which could have warranted the jury in coming to a different conclusion.

(e) *Rex v. Mellor and Another*, Russ. & Ry. 144. Where the indictment is preferred in the next adjoining county, under this statute of the 38 Geo. 3., for an offence in an inferior county, though the indictment must state the offence to have been committed in the inferior county, it need not aver that the county in which the indictment is preferred is the next adjoining county. But it may be stated in the caption, when the record is regularly drawn up, *Rex v. Goff*, Russ. & Ry. 179.

was sufficient to sustain the verdict. The bill was dated at Leicester, June 1st, 1827, and purported to be drawn and indorsed by E. Addison, to his own order, on W. Rawson, for 40*l.* at two months after date, and to be indorsed by Addison. Addison and Rawson both lived at Leicester, and Addison kept cash with Clark and Co. at that place. The bill was taken on the 5th June by one Porter to the bank of Clark and Co. with a request that they would discount it; but, the forgery being discovered, Porter was detained, and tried, and convicted at the same assizes for uttering the bill. It was proved that the whole of the bill—the date, body, signature, and indorsement were in the hand-writing of the prisoner. It was proved by one witness, that the father of the prisoner lived in Leicester, and that he believed the prisoner lived with him, having seen him there. Another witness proved that she saw the prisoner and Porter walking and talking together in a street in Leicester, about a week before the 5th of June. Another witness proved that she saw them pass her house together in another street in Leicester, in the course of a fortnight before the 5th of June. And it was proved by another witness that he saw them walking and talking together in another street in Leicester, a very short time before the same 5th of June. But none of the witnesses could fix the precise days to which they spoke. Lord Tenterden doubted whether there was such evidence of the forgery in Leicester as would justify him in leaving that point to the jury; but he left it to them, and the prisoner being found guilty, his Lordship respited the judgment, in order that the point might be submitted to the consideration of the Judges; who held the conviction right. (*f*)

Of the evidence.

The evidence in forgery must support the material facts stated in the indictment: and it is essentially necessary, that the proof should tally with the averment of the intent to defraud. (*g*) And we have seen, that the manner in which the fraud was carried or intended to be carried into effect is peculiarly matter of evidence. (*h*)

Of the incompetency of the party by whom the instrument purports to be made to prove it forged.

In respect of the persons who may be witnesses in cases of forgery, it should be well observed, as an established point, that a party by whom the instrument purports to be made is not admitted to prove it forged, if, in case of its being genuine, he would either be liable to be sued upon it, or be deprived by it of a legal claim against another. This is an exception to the general rules by which testimony in criminal cases is regulated, and has often been spoken of as an anomaly in the law of evidence: but it is now too well recognized to be disputed. Lord Ellenborough, C.J., in speaking of it said, "Upon what principle that anomalous case was so settled, I cannot pretend to say; but having been so settled, it may be too much for Judges sitting on trials to break in upon it. The anomaly can only be remedied now by the legislature." (*i*)

(*f*) *Rex v. Corah, Leicester Sum. Ass. 1827. M. T. 1827. MS.*

(*g*) *Ante*, 366, 367.

(*h*) *Ante*, 367, *et seq.*

(*i*) By Lord Ellenborough, C. J., in

Rex v. Boston, 4 East. 582. See the grounds of the anomaly discussed in 2 East. P. C. c. 19. s. 62. p. 993, and Phil. on Evid. 94.

Some of the cases in which the point has been decided may be briefly mentioned. On an information for the forgery of a deed, purporting to be the revocation of a will, it was adjudged by the Barons of the Exchequer, after a conference with the Judges of the King's Bench, that no legatee named in the will, nor any person who is a loser by the deed, or who may receive any advantage from the verdict, can be a witness for the prosecution. (*k*) In a case where the name of a person was forged to a receipt, such person was holden to be an incompetent witness to disprove the hand-writing. (*l*) So where the indorsement of one Gardiner was forged upon a promissory note, made payable to him or order, it was holden that Gardiner could not be a witness to prove that the hand-writing was not his. (*m*) And where a person, having a bill of exchange in his possession, indorsed a receipt upon it in a fictitious name, the acceptor was holden not to be a competent witness to prove the payment without a release from the indorsee. (*n*) So a person whose hand-writing was forged to a letter of attorney, to receive stock, was holden incompetent to disprove his hand-writing. (*o*) And the like determination was made in the case of an assignee of a certificate to a navy bill, whose name was charged to have been forged to a receipt for the money. (*p*)

It seems to be the prevailing opinion, that the incompetency of such witness is not confined to the single point of falsifying the hand-writing, but that he is equally incompetent to prove any other fact which contributes to the proof of the forgery; or, in other words, any fact conducive to the general conclusion. (*q*) An executor of a person, whose promissory note had been forged, was rejected as a witness to prove what the prisoner said to him when he tendered him the note for payment. (*r*) This subject was much discussed in a late case, where, on a prosecution for forging a promissory note, on which there was an indorsement in the prisoner's hand-writing of a year's interest having been paid, a question was made, whether the person by whom the note purported to be made might prove that he had never paid any interest on the note, as was pretended by the indorsement. The evidence was received at the trial, after proof of the fact of the forgery being first given; but the point was reserved for the consideration of the twelve Judges, and it seems to have been generally understood that the majority of them considered the evidence inadmissible. (*s*) It is said that Lord Ellenborough, C. J., Macdonald, C. B., Lawrence, J., and Le Blanc, J., thought the witness admissible, because it had

And it seems that such party is incompetent to prove any other fact which is conducive to the general conclusion.

(*k*) Watt's case, 3 Salk. 172, reported more fully in Hardr. 331. In Phil. on Evid. 94, note (4), the learned author observes, that in 4 Burr. 2254, Lord Mansfield says, that this, and other cases of the same kind, were "not considered, or looked into."

(*l*) Russel's case, O. B. 1737, 1 Leach 8. Reeves's case, 2 Leach 812.

(*m*) Caffy's case, O. B. 1729. 2 East. P. C. c. 19. s. 63. p. 995.

(*n*) Taylor's case, O. B. 1779, 1

Leach 214.

(*o*) Rex v. Rhodes, 2 Str. 728.

(*p*) Thornton's case, O. B. 1794, 2 Leach 634.

(*q*) Phil. on Evid. 93.

(*r*) By Adams, B., in Rex v. Geo. Bunting, *Thetford*, March, 1767, 2 East. P. C. c. 19. s. 63. p. 996.

(*s*) Crocker's case, 1805, 2 New R. 87. 2 Leach 987. Russ. & Ry. 97. Phil. on Evid. 93.

been sufficiently proved before that the note was not signed by him; and that they thought him admissible to all points except that of the forgery: but that some of the other Judges, though they seemed to think that to points perfectly collateral the witness would have been admissible, yet they considered the point to which he was called as contributing to prove the forgery. (*t*) In a more recent case, of an indictment for forging a promissory note, it appears to have been the opinion of the Judges, that the maker of the note, which purported to be payable on demand, at his own abode or at a London banker's, but was not in fact paid at either place, was a competent witness to prove that he had not made it payable at the banker's where it purported to be payable. (*u*) A case is reported, in which, upon an indictment for personating the proprietor of stock, and using his signature, such proprietor was admitted as a witness, to prove the amount of the stock which he had at the bank, and that the sum for which the prisoner had obtained the dividend warrant, was the exact sum due to him at the time. (*x*) In this case the witness was not examined to the falsity of the signature; and it seems that the facts to which he was examined might have been considered as merely collateral.

Where the party, whose handwriting is forged, has no interest in invalidating it, he is clearly a competent witness.

Where the party, whose handwriting is forged, has no interest in invalidating the instrument in question, he is without doubt a competent witness. Thus, where a bank note was forged in the name of one of the cashiers of the bank of England, he, not being personally chargeable, was holden to be a witness to prove the forgery, though he had given security for the faithful discharge of his duty. (*y*) And, in a case where, upon a prosecution for forging an acceptance to a bill of exchange, it appeared that, though the bankers at whose house it was made payable had, in the first instance, when they paid it, debited the account of the supposed acceptor with the payment, yet that, afterwards being satisfied of the forgery, they had given his account credit for the same sum, the supposed acceptor was admitted as a witness to prove that his name was forged. (*z*) So a person in whose name a receipt was forged has been admitted as a witness, having been paid the money by the debtor in fraud of whom the forgery was committed. (*a*) And where a man was indicted for forging a receipt, and the person whose name was forged had recovered the money from the prisoner, he was admitted as a witness to prove the forgery. (*b*) So where A. remitted a bill to B., and made it payable to B., for the purpose of paying the debt of A. to a third person, and not on his own account, B. never having received the bill, and having no interest in it, was agreed to

(*t*) Phil. on Evid. 94.

(*u*) Treble's case, 1810, 2 Taunt. 328. 2 Leach 1040.

(*x*) Parr's case, O. B. 1787, 1 Leach 434. 2 East. P. C. c. 19. s. 65. p. 997. But he was not examined as to the falsity of the signature.

(*y*) Newland's case, O. B. 1784, 1 Leach 311. 2 East. P. C. c. 19. s.

68. p. 1001.

(*z*) Usher's case, O. B. 1759, 2 East. P. C. c. 19. s. 66. p. 999. 1 Leach 48.

(*a*) Testick's case, 1774, 2 East. P. C. c. 19. s. 36. p. 925., and s. 66. p. 1000.

(*b*) By Willes, Lord C. J., in Wells's case, Bull. N. P. 289.

be a competent witness to prove that a forged indorsement on the back of it was not his handwriting. (c)

Upon an indictment for uttering a forged power of attorney to sell and transfer stock in the public funds, it has been holden that where the stock had not been transferred, and the person whose name was forged had given notice to the Bank disavowing the power, such person was a competent witness for the crown. And any objection was considered as further removed by previous proof that although there was an attestation importing that the person whose name was forged, executed in the presence of two witnesses, yet in fact he did not so execute in their presence; the bank acts not authorising any transfer under a power of attorney unless it be attested by two witnesses. And it was held not to make any difference whether the stock was the property of the person whose name was forged, or whether he was a mere trustee. (d)

Person whose name was forged to a power of attorney to transfer stock held to be a competent witness for the prosecution.

In several cases, the supposed testator of a forged will has been admitted as a good witness to prove the will to be a forgery, without any objection being made to the testimony. (e) And, though it is said to have been decided in one case that, on an indictment for forging a seaman's will, an executor named in a subsequent will was not a competent witness to prove the first a forgery; (f) yet it is difficult to discover any principle upon which such a decision can be supported. The will in which he was named executor, being the last will of the testator, was the only one which could have a legal operation; and the executor does not therefore, appear to have had any interest in the question relating to the former will, by which even his credit could have been deemed to be affected. (g)

In cases where the witness appears, upon the principles which have been above-mentioned, to be interested, there is no doubt that, if he be divested of such interest by release, payment, or otherwise, at the time he is ready to be sworn, it is no objection to his competency, whatever it may be, under certain circumstances, to his credit. (h) Thus it was holden that a release from the holder of a promissory note to the supposed drawer in whose name it was forged, (there being no other name on the note to whom the drawer could be liable,) made him a competent witness to prove the forgery of his handwriting. (i) But a witness, by whom a bill of exchange purports to be indorsed, is not rendered competent by a release from the person to whom the bill in question had been uttered, but who had not given any value for it; for he

Of the removal of the objection to the competency of a witness by a release.

(c) Sponsonby's case, O. B. 1784, 1 Leach 332.

(d) *Rex v. Waite*, Russ. & Ry. 505. 1 Bingh. R. 127.

(e) *Sterling's case*, O. B. 1773, 1 Leach 99. *Coogan's case*, O. B. 1787, 1 Leach 449. 2 East. P. C. c. 19. s. 67. p. 1001.

(f) *Rex v. Robert Rhodes*, *cor.* Reynolds, B., O. B. 1742. 1 Leach 24.

(g) See 2 East. P. C. c. 19. s. 63. p.

995, 996. 1 Chit. Crim. L. 598.

(h) 2 East. P. C. c. 19. s. 69. p. 1002, 1003. *Dr. Dodd's case*, O. B. 1777. 1 Leach 157, where the Earl of Chesterfield, the supposed obligor of the forged bond was admitted to disprove his signature, on producing a release from the supposed obligee. *Taylor's case*, *ante*, 375.

(i) *Akehurst's case*, *cor.* Lord Mansfield, C. J., 1776, 1 Leach 150.

has no interest in the bill; and the prisoner appearing to be the holder, a release from any other person would not be effectual. (*j*) A release from the holder of a bill to the supposed acceptor will make him a competent witness to prove the forgery in an indictment against the drawer; the drawer having received value for the bill from such holder. (*k*) And on an indictment against the payee of a bill for uttering a forged acceptance, it was holden, that the first indorsee was a competent witness though he had only advanced part of the amount of the bill, and though during the trial he released the person in whose name the acceptance was forged. And it was holden also that this release made the supposed acceptor a competent witness. (*l*)

If the party who wishes to call a witness tender a release to him, and he refuse to accept it, or the witness, having a claim, tender a release on his part, which is refused, he may be examined as a witness. (*m*)

As to the question, whether the party whose handwriting is forged, being competent, is the only witness to prove the forgery.

Where the party whose handwriting is forged, has no such interest, and is therefore a competent witness, it seems to have been considered in some cases, that, being the best, he is the only witness, if living, to prove the forgery: but it is observed, that this is not confirmed by the current of authorities to such an extent, though the testimony of such witness, when disinterested, must doubtless be the most satisfactory of any on the question of his own handwriting. (*n*)

Smith's case. The person whose voucher is forged for the purpose of imposing on a third person, with whom he had no dealing, and to whom he could in no event be responsible, is the proper witness to prove the forgery of his own handwriting.

The prisoner, Captain Smith, was tried for uttering a forged receipt of one George Maughan, a butcher, at the island of Granada, upon a bill for butcher's meat, supplied to the ship of which the prisoner was captain; and the crime was effected by altering the figures in the quantity of meat, and in the sum they amounted to, with intent to charge one Trinder, the owner of the ship, with larger disbursements than the captain had really laid out. To prove that these alterations were forgeries, and not the handwriting of Maughan, one Greenwood his partner was produced, as one who was acquainted with Maughan's hand: but as it did not appear that Maughan was dead, it was holden, that as he could give the best and most satisfactory evidence whether the alterations of the bill were or were not forged, no evidence but his could be admitted of the forgery, he having no degree of interest in the question, and being a competent witness to that fact. (*o*)

Hughes's case. Holden that the handwriting of a cashier of the Bank might be disproved by any other person who was acquainted with his handwriting.

But in a subsequent case of a prosecution for the forgery of a bank note it was ruled that the handwriting of the cashier of the Bank might be disproved by any other person who was acquainted with his handwriting. (*p*) And in a case which was re-

(*j*) *Rex v. Young, Worcester Lent* Ass. 1805. Phil. on Evid. 103.

(*k*) *Rex v. Peacock, Russ. & Ry.* 278.

(*l*) *Rex v. Mott, Russ. & Ry.* 430.

(*m*) Goodtitle dem. *Fowler v. Welford*, Doug. 139. 3 T. R. 35. *Peake Evid.* 174. Phil. on Evid. 104.

(*n*) 2 East. P. C. c. 19. s. 66. p. 999.

(*o*) Smith's (Captain) case, *cor.* Gould, J., and Yates, J., O. B. 1768. 2 East. P. C. c. 19. s. 67. p. 1000.

(*p*) Hughes's case, *cor.* Le Blanc, J., *Exeter Spr. Ass.* 1802. 2 East. P. C. c. 19. s. 68. p. 1002. And see Downes's case, *post* 1511, where a father was admitted to disprove the handwriting of his son, who was at Jamaica. And as to the Bank of Eng-

ferred to the consideration of the Judges, a conviction for forging a bank note was holden good, though there had been no testimony of the cashier at the trial to disprove his handwriting, and the forgery of the note had been proved by other evidence, which shewed that the instrument was false in all its parts, in the texture of the paper, the water mark, the engraving, the ink, and the written date of the year, which was 1798, though the printed date under the Britannia was 1799; being altogether proved to be such as the Bank never made or issued. (g)

proved by any other person acquainted with it.

Upon this subject an able writer upon the law of evidence observes, that the evidence of persons well acquainted with the character of the supposed writer of an instrument, for the purpose of proving or disproving the handwriting, is not in its nature inferior or secondary. He says, "though it may generally be true that a writer is best acquainted with his own handwriting, yet his knowledge is acquired precisely by the same means as the knowledge of other persons, who have been in the habit of seeing him write, and differs not so much in kind as in degree. The testimony of such persons, therefore, is not of an inferior or secondary species; nor does it give any reason to suspect, as in the case where primary evidence is withheld, that the fact to which they speak is not true. It is the common practice to receive such testimony in ordinary cases; and in prosecutions for capital offences it must be equally admissible." (r)

The evidence of persons acquainted with the handwriting, considered not to be inferior or secondary.

It is stated as an established rule of evidence that handwriting cannot be proved by comparing the paper in dispute with any other papers acknowledged to be genuine. (s) But in a case where the point was, whether a will had been forged, and a paper purporting to be instructions for the will, in the handwriting of the testatrix, became material, a question was put to a clerk of the post-office, who had been used to inspect franks and detect forgeries, if he could judge whether the instructions were written by the same person who was admitted to have written a certain memorandum at the bottom of the instructions, and who was suspected of having been the contriver of the will; and the question, though objected to, is said to have been allowed by the Court. (t) It is, however, observed, upon this evidence, that it was a mere comparison of handwriting; and a sort of comparison the least of all to be trusted, as it was an attempt to trace a resemblance between two papers which the writer would endeavour to make as unlike as possible. (u) In the foregoing case, the clerk of the

Handwriting cannot be proved by comparison with a genuine paper. And *qu.* as to the examination of persons of skill as to the handwriting being genuine, or an imitation, from its appearance.

land cases, it was holden more recently, in a case reserved, that it is not necessary that the signing clerk should be produced, if witnesses acquainted with his handwriting state that the signature to the note is not his hand-writing, *Russ. & Ry.* 378.

(g) *M'Guire's case*, 1801. 2 East. P. C. c. 19. s. 68. p. 1002.

(r) *Phil. on Evid.* 179.

(s) *Id. Ibid.* 428.

(t) *Goodtitle dem. Revett v. Braham*, (trial at bar in K. B.) 4 T. R. 497.

(u) *Phil. on Evid.* 430. In *Cary v. Pitt*, *Peake on Evid.* lxxxv. upon a question being put by the counsel to a witness, whether, having been used to detect forgeries, he could say if the handwriting in question was a genuine handwriting or otherwise, Lord Kenyon, C. J., said he could not receive such evidence; and observed that though it was received in *Goodtitle v. Braham*, he had not, in his charge to the jury, laid any stress upon it.

post-office was also allowed to speak to the general appearance of the handwriting of the instructions, and to say whether, from his general knowledge of writing, the instructions were a natural, or an imitated hand; this matter being considered as a question of art, which might be answered by a witness of skill and experience. (x) The subject underwent very considerable discussion in a subsequent case; (y) from which, it is said, this distinction may properly be made, namely, that persons of skill may be called to ascertain, whether handwriting is genuine, or whether it was written at interrupted strokes, like the writing of a person attempting to imitate the hand of another: but that they cannot be asked whether the same hand which wrote another paper wrote also the feigned paper. (z) The admissibility, however, of evidence of this kind, was denied by a very learned Judge in a late case, where, upon a feigned issue to try a question of forgery, the evidence of an inspector of franks at the post-office was tendered in support of the alleged forgery. The question put to the witness (who had stated that he was unacquainted with the handwriting of the party whose handwriting was the subject of enquiry) was, whether from his knowledge of handwriting he believed the handwriting in question to be a genuine signature or an imitation: and objection being taken to the question, the learned Judge allowed the objection, and stated several strong reasons in his report to the Court of King's Bench against the admissibility of evidence of this kind, which he termed loose general evidence. The Judges of the Court of King's Bench expressed doubts as to the evidence being admissible, and refused to disturb the verdict, on the ground of its having been rejected; for even if it were admissible, it was in their opinions entitled to very little weight. (a)

Where the question is, whether a seal has been forged, seal engravers may be called to shew a difference between a genuine impression and that supposed to be false. (b)

With respect to the admission of his own handwriting by a party accused, a case is reported where upon an indictment against Richard Beatty and two others, for a conspiracy to defraud, by means of a fraudulent acceptance of a bill of exchange, the indictment averred that Beatty, in pursuance of the conspiracy, *did fraudulently, &c. write his acceptance* to the bill; and no other evidence was given either of the fact of writing the ac-

Of the admission of his own handwriting by a party accused.

(x) *Goodtitle v. Braham*, *ante* 379. note (t). This witness and another clerk of the post office, who was also examined, admitted on their cross-examination, that they had never detected an imitation of the hand of a very old person who wrote with difficulty, and might be supposed frequently to stop. And they said that their principal means of knowledge was by seeing whether the letters were *painted*, that is, gone over a second time with the pen; which, however, they admitted might happen to any person from a failure of ink.

(y) *Rex v. Cator*, *cor.* Hotham, B., *Maidstone* Spr. Ass. 1802. 4 Esp. 117.

(z) *Phil. on Evid.* 430. *Peake on Evid.* 112. In this case of *Rex v. Cator*, Hotham, B., said, "I perfectly agree with the counsel for the prosecution that there is no difference in point of evidence, whether the case be a criminal or a civil case; the same rules must apply to both."

(a) *Gurney v. Longlands*, 5 B. & A. 330.

(b) By Lord Mansfield, C. J., in *Folkes v. Chad*, 1783, MS. cited in *Phil. on Evid.* 227.

ceptance, or of the handwriting of Beatty, than that of a witness, who proved that the bill, with the acceptance written upon it, was shewn to Beatty, who, being asked whether it was a good bill, answered that *it was very good*. The defendants were convicted, and a question reserved for the consideration of the Judges, whether this evidence supported the allegation in the indictment that Beatty wrote the acceptance: and all the Judges were of opinion that it was proper evidence to be left to the jury, upon which they might found their verdict that Beatty wrote the acceptance. (c)

Questions have frequently arisen as to the necessary proof of the identity or non-existence of the person whose name is charged to be forged.

In a case which has been already mentioned, in which it was holden that the payee of a bill of exchange was a competent witness under the circumstances to prove that his name indorsed thereon was a forgery, (d) it further became necessary to shew that such payee, whose name was Wm. Pearce, was the identical Wm. Pearce to whom the bill was made payable. The drawer of the bill, whose testimony was considered as the best evidence of the fact, was not produced; and the question was then raised, whether a letter of advice which Pearce had received from the drawer, with whom he was intimate, signifying that such a bill had been remitted to him, and desiring him, as an act of friendship, to pay the produce to one Coles, in discharge of a debt which the drawer owed to Coles, was sufficient evidence. And Adair, Serjt. Recorder, before whom the prisoner was tried, held that it was not sufficient; and the testimony of Pearce to shew the handwriting to be forged was ultimately rejected, on the ground that though he might shew it not to be his own handwriting, yet it might be the handwriting of another Wm. Pearce, to whom the bill might be payable. (e) But upon this case a doubt is suggested whether the fact of Wm. Pearce being an intimate acquaintance and correspondent of the drawer, no evidence being given of the existence of any other Wm. Pearce to whom it might be supposed that the bill was made payable, was not sufficient evidence of the identity of the payee: and it is observed, that under the circumstances of the case he had no interest in proving himself to be the real payee. (f)

A case has been already mentioned where, upon an indictment for personating a proprietor of stock, such proprietor was examined as a witness, to shew the amount of the stock he had at the bank; and that the sum for which the prisoner had obtained the dividend warrant was the exact sum due to him at the time; evidence which would have the effect of proving his identity. (g)

Questions as to the proof of the identity or non-existence of the person whose name is charged to be forged.

Sponsonby's case.

As to the proof of the identity of a payee of a bill of exchange.

Parr's case. Proprietor of stock examined to prove his identity.

(c) *Rex v. Hevey, Beatty, and M'Carty*, O. B., 1782, East. T., 22 Geo. 3. 2 East. P. C. c. 19. s. 5. p. 658. note (a). 1 Leach 232.

(d) *Sponsonby's case*, ante 377.

(e) *Sponsonby's case*, cor. Adair,

Serjt. Recorder. O. B., 1784. 1 Leach 332. 2 East. P. C. c. 19. s. 65. p. 996, 997.

(f) 2 East. P. C. c. 19. s. 65. p. 997.

(g) *Parr's case*, ante, 376.

Downes's case. Where the name of the drawer and also that of the indorser were forged on a bill it was holden not to be an objection that the drawer was not called to prove upon whom the bill was drawn, there being two of the name at the place; and that it might be shewn by other evidence who the prisoner meant by the person whose name he forged, as the payee and indorser.

The prisoner, James Downes, was indicted for forging a bill of exchange purporting to have been drawn by one Andrew Holme, payable to the order of John Sowerby. From some letters written by the prisoner after his apprehension it clearly appeared that the name of the supposed drawer, Andrew Holme, who was the prisoner's uncle, was forged: and it also appeared from the same letters that the John Sowerby, whose indorsement was intended to be counterfeited by the prisoner, was the son of another person of the same name at Liverpool. A witness to whom the prisoner paid away the bill stated that he questioned the prisoner at the time, and that the account he gave was that the drawer of the bill, Andrew Holme, was a gentleman of credit at Liverpool, and the indorser a cheesemonger there, who had received the bill in payment for cheeses; and the prisoner further said that he might depend on it it was a good bill. Neither Andrew Holme nor John Sowerby the son were called as witnesses; but John Sowerby the father was produced, and he swore that the indorsement was not his handwriting; that he had lived thirty-six years in Liverpool, and knew no other person of the same name there, either a cheesemonger or otherwise, except his son, who had left him about four months before, and afterwards carried on the same business of a cheesemonger in Dean-street. That his son had failed, and was lately gone to Jamaica. That the indorsement was not at all like his son's handwriting; and he did not believe it to be his. That the prisoner and his son were acquainted, and the prisoner had bought corks of him. Another witness also proved that the indorsement was not like the handwriting of the son, and that he did not believe it to be his. An objection was taken on behalf of the prisoner, that Andrew Holme, the drawer of the bill, ought to have been called to prove what John Sowerby it was in whose favour it was drawn; but the evidence was left by the learned Judge, who tried the prisoner, to the jury, and the prisoner was found guilty. And the point being afterwards submitted to the consideration of the twelve Judges, they were all of opinion that the conviction was proper. Buller, J., who afterwards passed sentence upon the prisoner, in adverting to the reasons upon which the opinion of the Judges proceeded, said that the objection supposed that there was a genuine drawer of the bill; whereas it was apparent, from the prisoner's own acknowledgments in his letters, that the name of the drawer, as well as that of the indorser, was forged by the prisoner: and if no real drawer existed, and the objection were allowed, it would be to excuse one forgery because another had been committed. He observed, in the second place, that the prisoner himself had ascertained who was intended by the John Sowerby whose indorsement was forged; for, when he negotiated the bill, he represented him to be a cheesemonger at Liverpool; and by another letter of the prisoner it was clear that he meant Sowerby the son; for thereby he requested his uncle to go to Sowerby's mother, and desire her to say nothing about it, whether he had any concern or not, or whether he indorsed it or not. And he concluded by saying that, it being proved that the indorse-

ment was not the handwriting of Sowerby the son, the evidence of the forgery was full and complete, and the conviction right. (i)

It has been already observed, that the publication of the forged instrument, with knowledge of the fact, is made a substantive offence, by most of the statutes which relate to forgery; (k) and in cases of this kind the knowledge of the fact, or as it is frequently termed, the *guilty knowledge*, becomes a material part of the evidence. The subject has come under consideration in several modern cases.

Of the guilty knowledge, where the publication with knowledge of the fact is made a substantive offence.

Two prisoners were indicted for disposing of, and putting away a forged bank note for one pound, *knowing the same to be forged*. It was proved that they put off the forged note stated in the indictment at the shop of one John Hind; and then, in order to shew that they knew the note to be forged, evidence was offered to prove that they had before passed other forged notes to other persons. This evidence was objected to by the counsel for the prisoners, who urged that no evidence could be given of any transaction not stated in the indictment, since the prisoners could not be prepared to defend themselves against a charge of which they had no notice. But the learned Judges, before whom the prisoners were tried, overruled the objection. Lord Ellenborough, C. J., said, "Certainly no different rule of law can prevail "with respect to prosecutions by the Bank from those commenced "by any other person. This point, however, is not new; it was "reserved in the case of *The King v. Tattersall*, which was tried "at Lancaster, in 1801, by Mr. J. Chambre, and received the collective voices of the Judges. The question was, whether in giving evidence to prove an allegation that the party uttered a "bank note knowing it to be forged, the prosecutor might give "the conduct of the prisoner in evidence, to shew his knowledge "of the forgery? The learned Judge reserved the question, "whether the prisoner had not furnished pregnant evidence, and "whether the jury, from his conduct on one occasion, might not "infer his knowledge on another? The opinion of the Judges "was, that the jury were at liberty to make such inference. The "prisoner does not come unprepared; it is alleged that he uttered a note, knowing it to be forged. Are we then to exclude "all evidence, but what is furnished by this particular transaction, since without other evidence it is impossible to ascertain "whether the party uttered the note with knowledge, or under "circumstances which shewed the uttering to be venial? I remember a case in which a person came to Manchester with a "large parcel of forged notes; his whole demeanor afforded pregnant evidence of the mind and purpose for which he came; and "a question was made, whether that evidence should be received; "for it was said that it would be trying the prisoner for other "utterings. But if crimes do so intermix, the Court must go "through the detail. I remember a case where a man committed "three burglaries in one night; he took a shirt at one place, and

Wylie's case. Upon an indictment for uttering a forged bank note, knowing it to be forged, evidence may be given of other forged notes having been uttered by the prisoner, in order to shew his knowledge of the forgery.

(i) *Downes's case, Lancaster Sum. P. C. c. 19 s. 65. p. 997. Ass. 1789, Mich. T. 1789. 2 East.* (k) *Ante, 318.*

"left it at another; and they were all so connected that the Court went through the history of the three different burglaries. The more detached in point of time the previous utterings are, the less relation they will bear to that stated in the indictment. But in such case the only question would be, whether the evidence was sufficient to warrant the inference of knowledge from such particular transactions? It would not make the evidence inadmissible. Such evidence may come out from these circumstances as to leave no doubt that the prisoners must have known what sort of paper they were passing." (l)

So in a case where the prisoner was indicted for forging and for uttering with guilty knowledge a bill of exchange, purporting to be drawn upon a certain banking house, it was holden that other forged bills upon the same house, which were found upon the prisoner at the time of his apprehension, were admissible as evidence of guilty knowledge. (m)

Ball's case. Upon a similar indictment, evidence is admissible of the prisoner having some time before uttered another forged note of the same manufacture; and also of a number of others having been in circulation which were of the same manufacture, with the prisoner's handwriting on the back of them.

In a subsequent case, the prisoner was also indicted for disposing of and putting away a forged bank note, which purported to be a promissory note of the governor and company of the Bank of England, *knowing the same to be forged*. Clear proof was adduced, that the note in question was forged, and that it had been uttered by the prisoner at East Bourn, on the 17th of June 1807; so that the only remaining question was, as to his *guilty knowledge* of the forgery. To establish this, evidence was offered and admitted, that on the 20th of March preceding, he had passed off a 10*l*. Bank of England note likewise forged, and of the same manufacture; and that there had been paid into the Bank of England various forged notes, dated between Dec. 1806, and March 1807, all of the same manufacture, and having different indorsements upon them, in the handwriting of the prisoner. It likewise appeared, that when he was apprehended he had in his possession paper and implements fit for making notes of the same kind with those produced. The prisoner was found guilty: but sentence was respited for the purpose of taking the opinion of the twelve Judges, as to the admissibility of this evidence. They were of opinion that it was admissible, to prove the knowledge of the prisoner that the note was forged; and that every thing which he said or did was proper to be admitted to shew his knowledge of the forgery. (n)

Crocker's case. Evidence of another forged promissory note in the same pocket-

In another case, where the prisoner was indicted for forging a promissory note, (not a note of the Bank of England,) and also for uttering it, evidence was given that, in the same pocket-book belonging to the prisoner in which the forged note was found, on

(l) *Kex v. Wylie and Another, cor. Ellenborough, C. J., Heath, J., and Thomson, B., O.B. 1804.* 1 New R. 92. S. C. by the name of *Whiley and Haines*, 2 Leach 983. And see *ante*, p. 85, 86, as to the guilty knowledge in uttering counterfeit money; and *Phil. on Evid.* (3d edit) 142, 143.

(m) *Rex v. Hough*, 1806, Russ. & Ry. 120.

(n) *Rex v. Ball, Lewes Sum. Ass. 1808.* 1 Campb. 324. Russ. & Ry. 132. In this case the Judges were of opinion, that although it should appear upon a case reserved, that evidence had been admitted at the trial which ought not to have been received, yet if there were ample evidence to support the indictment, after rejecting such improper evidence, the conviction ought not to be set aside.

which the indictment proceeded, there was also found another promissory note, for 100*l.*, payable to the prisoner or order, appearing to be signed by one Wm. Gapper, which Wm. Gapper proved not to be his handwriting, and that he never owed the prisoner 100*l.* This evidence of Gapper's note was objected to by the prisoner's counsel, but the Judge received the evidence. (o)

book where the note was found on which the indictment proceeded.

But if the possession of other forged instruments is offered in evidence to prove a guilty knowledge, there must be regular evidence that such instruments are forged; and proof that the prisoner returned the money on any such instrument, and received the instrument back again, is not sufficient without producing the instrument, or duly accounting for its non-production. (p)

The punishment of forgery at common law is, as for a misdemeanor, by fine, imprisonment, and such other corporal punishment as the Court, in their discretion, shall award. The punishments ordained for the offence by the statute-law, which are for the most part capital, will be mentioned, with the other enactments of the different statutes, in the succeeding Chapters.

Punishment.

A consequence of the judgment for forgery is an incapacity to be a witness until restored to competency by the king's pardon. (q)

Incompetency to be a witness after judgment.

And the statute 12 Geo. 1. c. 29., provides that, in case persons convicted of forgery shall afterwards practise as attornies, solicitors, or law agents, the Court where the suit or action is brought shall, on complaint, examine the matter in a summary way, in open court, and cause the offender to be transported for seven years. (r)

Attornies convicted of forgery, and afterwards practising, are to be transported for seven years.

(o) *Rex v. Crocker, cor. Le Blanc, J., Salisbury Sum. Ass. 1805.* 2 New R. 87, 88. *ante*, 373, and 375. The prisoner was convicted, and the case was submitted to the consideration of the twelve Judges; but their opinion upon this point does not appear. The prisoner was in fact pardoned, and discharged: but there were several objections to the conviction. It is, however, understood that the Judges were of opinion that the witness was incompetent. See *ante*, 373, note (b),

and *Russ. & Ry.* 97.

(p) *Rex v. Millard, Russ. & Ry.* 245.

(q) 1 Hawk. P. C. c. 70. s. 1. 4 Black. Com. 247. 3 Bac. Ab. *Forgery*. 2 East. P. C. c. 19. s. 69. p. 1003. The corporal punishment of the pillory may not now be inflicted for this offence; 56 Geo. 3. c. 138.

(r) Co. Lit. 66. 2 Hawk. P. C. c. 46. s. 101. Com. Dig. *Testmoign*, A. 5.

CHAPTER THE THIRTY-THIRD.

OF THE FORGING, ALTERING, &C. OF RECORDS AND JUDICIAL PROCESS.

It is clear that, by the common law, a person may be guilty of forgery by falsely and fraudulently making or altering any matter of record: for, since the law gives the highest credit to all records, it cannot but be of the utmost ill consequence to the public to have them either forged or falsified. (a) If, therefore, a man should insert in an indictment the names of those against whom in truth it was not found, it would be forgery. (b)

Even if the offence should not constitute a forgery; yet in no instance can the counterfeiting or alteration of any judicial process or matter be less than a very high misdemeanor, as tending to stop or impede the course of justice, or to encroach upon the judicial power. (c) The defacing or rasure of any record, without due authority, is an offence at common law, highly punishable by fine and imprisonment. (d) And it has been holden that any person making or knowingly using a false affidavit, taken abroad, (though a forging could not be assignable on it here,) in order to mislead our own Courts, and to prevent public justice, is punishable by indictment for a misdemeanor. (e)

Judges are highly punishable at common law for offences of this kind. (f) And the statute 8 Rich. 2. c. 4. applies expressly to Judges as well as to clerks.

(a) 1 Hawk. P. C. c. 70. s. 1, 8. 3 Bac. Ab. *Forgery*, (B). Roll. Ab. 65, 76. Yelv. 146. Cro. Eliz. 178.

(b) *Rex v. Marsh and others*, 3 Mod. 66. 1 Hawk. P. C. c. 70. s. 2.

(c) 2 East. P. C. c. 19. s. 9. p. 866.

(d) 3 Inst. 71, 72. 1 Hale 646. 1 Hawk. P. C. c. 47. s. 1.

(e) *Omealy v. Newell*, 8 East. 364. And see *Fawcett's case*, 2 East. P. C. c. 19. s. 7. p. 862. *Ante*, 352.

(f) 3 Inst. 72. 1 Hale 646. In 3 Inst. 72, the case of Justice *Ingham* (or *Hengham*, or as *Hawkins* says, *Ingram*) who was a Judge in the reign

of Edw. 1. is mentioned thus: He paid "eight hundred marks for a fine, "for that a poore man being fined in "an action of debt at thirteen shil- "lings four-pence, the said Justice, "moved with pity, caused the roll to "be rased, and made it six shillings "eight-pence. This case Justice "Southcot remembered, when Cat- "lyn, Chiefe Justice of the King's "Bench, in the reign of Queen Eliza- "beth, would have ordered a rasure "of a roll in the like case, which "Southcot, one of the Judges of that "Court, utterly denied to assent unto,

The 8 Rich. 2. c. 4. enacts, that "if any Judge or clerk" offend by the false entering of pleas, rasing of rolls, or changing of verdicts, to the disherison of any one, he shall be punished by paying a fine to the King, and making satisfaction to the party.

8 Rich. 2. c. 4. As to any Judge, &c. falsely entering pleas, &c.

By the 21 Jac. 1. c. 26. s. 2. all persons who "shall acknowledge or procure to be acknowledged, any fine or fines, recovery or recoveries, deed or deeds inrolled, statute or statutes, recognizance or recognizances, bail or bails, judgment or judgments, in the name or names of any other person or persons not privy or consenting to the same," being thereof convicted or attainted, shall be adjudged felons, and suffer death without benefit of clergy. The attainder is not to work corruption of blood or loss of dower. And the act is not to extend to any judgments acknowledged by attornies of record for any persons against whom any such judgments shall be given. (g) A bail taken before a Judge is not a bail within this statute till it be filed of record. (h)

21 Jac. 1. c. 26. s. 2. Persons acknowledging fines, bails, &c. in the name of another not privy thereto made felons without clergy.

The statute 52 Geo. 3. c. 143. enacts, "that if any person shall make, forge, or counterfeit, or cause or procure to be made, forged, or counterfeited, the mark or hand of the receiver of the prelines at the alienation office, upon any writ of covenant, whereby such receiver or any other person shall or may be defrauded, or suffer any loss thereby; every person so offending, and being thereof convicted, shall be adjudged guilty of felony, and shall suffer death as a felon, without benefit of clergy."

52 Geo. 3. c. 143. s. 5. Any person forging, &c. the hand of the receiver of the prelines at the alienation office made guilty of felony without clergy.

"and said openly, that he meant not to build a clock-house; for (said he) with the fine that Ingham paid for the like matter, the clock-house at Westminster was builded, and furnished with a clock, which continueth to this day."

(g) S. 3.

(h) 1 Hale 696. So that the acknowledging of such bail not filed in another's name was only a misdemeanor till the statute 4 W. & M. c. 4. s. 4. which will be mentioned in a subsequent Chapter on *Falsely Personating*.

CHAPTER THE THIRTY-FOURTH.

OF FORGERIES RELATING TO THE PUBLIC FUNDS, AND THE STOCKS OF PUBLIC COMPANIES.

8 Geo. 1. c. 22. s. 1. Persons forging, &c. letters of attorney, &c. to transfer stock, or receive dividends, forging, &c. the names of proprietors to such letters of attorney, &c. demanding stock, &c. by virtue of such letters of attorney, &c. or personating proprietors, &c. are to be adjudged guilty of felony without clergy.

THE statute 8 Geo. 1. c. 22. s. 1. recites that frauds and abuses had been committed by forging and counterfeiting the hands of some of the proprietors of the shares in the capital stock and funds of bodies politic or corporate, established by acts of parliament, or the hands of persons entitled to dividends or annuities; and enacts, “that if any person or persons whatsoever shall forge
“or counterfeit, or procure to be forged or counterfeited, or
“knowingly or wilfully act or assist in the forging or counterfeiting any letter of attorney, or other authority or instrument to
“transfer, assign, sell, or convey any such share or shares, or any
“part of such share or shares, of and in such capital stock or
“stocks as aforesaid, or any of them, or to receive any such
“annuity or annuities, dividend or dividends as aforesaid, or any
“of them, or any part thereof, or shall forge or counterfeit, or
“procure to be forged or counterfeited, or knowingly and wilfully
“act or assist in the forging or counterfeiting any the name or
“names of any the proprietors of any such share or shares in
“stock, or of any the persons entitled to any such annuity or
“annuities, dividend or dividends as aforesaid, in or to any such
“pretended letter of attorney, instrument, or authority, or shall
“knowingly and fraudulently demand or endeavour to have any
“such share or shares in stock, or any part thereof, transferred,
“assigned, sold, or conveyed, or such annuity or annuities, dividend or dividends, or any part thereof, to be received by virtue
“of any such counterfeit or forged letter of attorney, authority,
“or instrument, or shall falsely and deceitfully personate any
“true and real proprietors of the said shares in stock, annuities
“and dividends, or any of them, or any part thereof, and thereby
“transferring or endeavouring to transfer the stock, or receiving
“or endeavouring to receive the money of such true and lawful
“proprietor, as if such offender were the true and lawful owner
“thereof; then and in every or any such case, all and every such
“person and persons (being thereof lawfully convicted in due
“form of law) shall be adjudged guilty of felony, and shall suffer
“as in cases of felony, without benefit of clergy.”

The statute 31 Geo. 2. c. 22. s. 77. recites that doubts might arise whether the punishment inflicted by the 8 Geo. 1. c. 22. s. 1. extended to the commission of the like forgery and offences, in relation to such capital stocks and funds as had been established by the authority of parliament since the passing of that act, and might be thereafter established; and then enacts, "That if any person or persons whatsoever shall forge or counterfeit, or procure to be forged or counterfeited, or knowingly and wilfully act or assist in the forging or counterfeiting any letter of attorney, or other authority or instrument, to transfer, assign, sell or convey any share or shares, or any part of any share or shares, of or in any such capital stock or funds of any body or bodies politic or corporate established, or which shall be established, by any act or acts of parliament; or to receive any dividend or dividends attending any share or shares, or any part of any share or shares, of or in any such capital stock or funds as aforesaid; or to receive any annuity or annuities, in respect whereof any proprietor or proprietors have or shall have any transferable share or shares of or in any capital stock or stocks which now are or hereafter shall be established by any act or acts of parliament, in proportion to their respective annuities; or shall forge or counterfeit, or procure to be forged or counterfeited, or knowingly and wilfully act or assist in the forging or counterfeiting any the name or names of any the proprietors of any such share or shares in stock, or of any the persons intitled to any such annuity or annuities, dividend or dividends as aforesaid, in or to any such pretended letter of attorney, instrument or authority; or shall knowingly or fraudulently demand, or endeavour to have, any such share or shares in stock, or any part thereof, transferred assigned, sold, or conveyed, or such annuity or annuities, dividend or dividends, or any part thereof, to be received by virtue of any such counterfeit or forged letter of attorney, authority or instrument; or shall falsely and deceitfully personate any true and real proprietors of the said shares in stock annuities and dividends, or any of them, or any part thereof, and thereby transferring or endeavouring to transfer the stock, or receiving or endeavouring to receive the money, of such true and lawful proprietor, as if such offender were the true and lawful owner thereof; then and in every or any such case, all and every such person and persons, being thereof lawfully convicted in due form of law, shall be deemed guilty of felony, and suffer death as a felon, without benefit of clergy."

By the 4 Geo. 3. c. 25., which statute continued the corporation of the Bank, the same provisions are extended to "any capital stock or stocks of any body or bodies politic or corporate *which now are or hereafter shall be established by any act or acts of parliament, or any share, &c.*" (a)

The statute 33 Geo. 3. c. 30. recites, that the laws then in being had been found insufficient to prevent forgeries and frauds in the transferring stocks, annuities, and other public funds, transferable

31 Geo. 2. c. 22. s. 77. The provisions of the former act 8 Geo. 1. c. 22. extended.

4 Geo. 3. c. 25. s. 15.

33 Geo. 3. c. 30. makes further provisions in respect of

forgeries and frauds in transferring stocks, &c. at the Bank of England.

Section 1.
Persons making transfers of stock at the Bank of England, in the name of any person not being the owner, are to be deemed guilty of felony, without clergy.

Section 2.
Persons forging, &c. any transfers of stock, &c. at the Bank of England, to be deemed guilty of felony, without clergy.

Section 3.
Persons making false entries in the books of the Bank of England, or falsifying the accounts, to be deemed guilty of felony without clergy.

at the Bank of England; and that further provision was necessary: and that it was also necessary, in order to prevent such forgeries and frauds, that the public accounts between the Bank of England, and the proprietors of stock, &c. should be secured from falsification, by means of false entries, the alteration of words or figures, or by any other ways or means; and then makes several enactments for the remedy of the evils recited.

The first section enacts, "That if any person or persons shall wilfully make or assist in making any transfer of any interest, part or share of or in any stock or stocks, annuity or annuities or other funds, transferable at the Bank of England, in any of the books of the said governor and company of the Bank of England, in which transfers of stock, annuities or other funds as aforesaid are made, in the name or names of any person or persons not being the owner or owners, or proprietor or proprietors, of such stock, annuities or other funds, transferable as aforesaid, with intent to defraud the said governor and company of the Bank of England, or any other body politic or corporate, or any person or persons whatsoever, such person or persons so making or assisting in making such transfer as aforesaid, shall be deemed guilty of felony, and shall suffer death as a felon or felons, without benefit of clergy."

By the second section it is further enacted, "That if any person or persons shall falsely make or counterfeit, or cause or procure to be falsely made, forged or counterfeited, or shall willingly act or assist in the falsely making, forging or counterfeiting of any transfer of any interest, part or share of or in any stock or stocks, annuity or annuities or other funds, transferable, or which, by any act or acts of parliament, shall hereafter be made transferable at the Bank of England, or of or in the capital stock belonging or which hereafter shall or may belong to the said Governor and Company of the Bank of England, called bank-stock, or shall utter or publish as true any such false forged or counterfeited transfer as aforesaid, knowing the same to be false, forged or counterfeited, with intent to defraud the said Governor and Company of the Bank of England, or any other body politic or corporate, or any person or persons whatsoever; all and every person or persons whatsoever so offending shall be deemed guilty of felony, and shall suffer death as a felon or felons, without benefit of clergy."

By the third section, it is further enacted, "That if any person or persons shall wilfully make or assist in making any false entry, or shall wilfully alter or assist in altering, any word or figure in any entry in the books of account kept by the said Governor and Company of the Bank of England, wherein the several accounts of the owners or proprietors of stock, annuities or other funds, transferable at the Bank of England, are entered and kept, or shall in any manner wilfully falsify the accounts of such owners and proprietors in the books of the said Governor and Company, wherein such accounts are entered and kept, with intent to defraud the said Governor and Company of the Bank of England, or any other body politic or corporate, or any

"person or persons whatsoever, every such person or persons so offending shall be deemed guilty of felony, and shall suffer death without benefit of clergy."

The fourth section recites that, in order to cover and conceal forgeries and frauds in transfers, dividend warrants had been sometimes made out for different sums than the sums really due; and enacts, "That if any clerk, officer or servant of, or other person or persons employed or intrusted by the said Governor and Company, shall knowingly or willingly make out or deliver, or cause or procure to be made out or delivered, or willingly act or assist in the making out or delivering, of any dividend warrant for greater or less amount than the person or persons, on whose behalf or pretended behalf such dividend warrants shall be made out, is or are entitled to, with intent to defraud the said Governor and Company of the Bank of England or any other body politic or corporate, or any person or persons whatsoever, all and every such person or persons so offending, and being in due form of law convicted of any such offence or offences as aforesaid, shall be transported for seven years."

The 37 Geo. 3. c. 122. relates to the forging or counterfeiting the names of witnesses to letters of attorney, or other authorities or instruments for the transfer of stocks or funds transferable at the Bank of England, or under the management of the South Sea Company, or East India Company, or for the receipt of dividends upon any of such stocks or funds. It enacts, "That if any person or persons whatsoever shall falsely make, forge, or counterfeit, or cause or procure to be falsely made, forged, or counterfeited, or shall willingly act or assist in the falsely making, forging, or counterfeiting the name or names, handwriting or handwriting of any person or persons as, or purporting to be the witness or witnesses attesting the execution of any letter of attorney or other authority or instrument, to transfer, assign, sell, or convey, any interest, part, or share of or in any stock or stocks, annuity or annuities or other funds, or the dividends thereof, transferable, or which, by any act or acts of parliament, shall hereafter be made transferable at the Bank of England, or of or in the capital stock belonging, or which hereafter shall or may belong to the Governor and Company of the Bank of England, called bank-stock, or to the Governor and Company of Merchants of Great Britain, trading to the South Seas and other parts of America, and for encouraging the fisheries as aforesaid, or under their care or management, or of or in the capital stock belonging or which hereafter shall or may belong to the said United Company of Merchants of England trading to the East Indies, commonly called East India Stock, or of any letter of attorney or other authority or instrument, to receive any dividend or dividends on any of the said stocks, annuities, or other funds, or shall utter or publish as true any such letter of attorney or other authority or instrument, containing such false, forged, or counterfeited name or names, handwriting or handwriting of such attesting witness or witnesses as aforesaid, knowing such name or names, handwriting or handwriting, to be false, forged or counterfeited, all

Section 4.
Persons employed by the Bank of England, making out, &c. false dividend warrants, to be transported for seven years.

37 Geo. 3. c. 122. Forging names of witnesses to letters of attorney, &c. for the transfer of stock, &c. of the Bank of England, or South Sea or East India Companies, made felony; punishable by transportation or lesser punishment.

“and every person or persons whatsoever so offending, and being
“in due form of law convicted of any such offence or offences as
“aforesaid, shall be adjudged guilty of felony, and shall be trans-
“ported for seven years, or shall be adjudged to suffer such
“lesser punishment as the Court, before whom such offender or
“offenders shall be tried, shall think fit to award.”

9 Geo. 1. c. 12.
35 Geo. 3. c.
66., and other
statutes.

Besides the statutes above set forth, there may be briefly noticed the 9 Geo. 1. c. 12. s. 4., which makes it a capital felony to forge orders, receipts, &c. relating to the payment of *annuities* payable at the Exchequer, as mentioned in the act; and the 35 Geo. 3. c. 66., with the 37 Geo. 3. c. 46., which contain regulations for transferring the payment of certain *annuities* and dividends from Ireland to the Bank of England, make the forging or altering receipts for subscriptions to loans or debentures, under these acts, a capital offence, re-enact the provisions of the 8 Geo. 1. c. 22. s. 1. (b) and the 33 Geo. 3. c. 30. (c), and make the forging or uttering any dividend warrant, or warrant for the payment of any annuity, &c. payable in pursuance thereof, capital offences. The 52 Geo. 3. c. 129. also, which is entitled an act for amending the 48 Geo. 3. c. 142. and the 49 Geo. 3. c. 64. in enabling the commissioners for the reduction of the national debt to grant life-annuities, recites those acts, specifies the terms on which the life-annuities shall be granted, declares before whom the necessary affidavits or affirmations and certificates shall be taken; and enacts that, if any person shall forge, &c. any such affidavit, affirmation or certificate, or produce to any person acting under the authority of the acts, or utter the same, knowing the same to be forged, &c. such person shall be guilty of felony, without benefit of clergy. And the 54 Geo. 3. c. 70. which was passed for the further improvement of the land revenue of the Crown makes it a capital offence, (by s. 38.) to forge any transfers of funds by that act directed to be sold, &c., or any receipts, warrants, &c. for dividends, monies, &c. under any of the provisions of that act.

In the acts by which the different *loans* have been raised, common clauses have usually been inserted, in substance nearly the same, by which it is made a capital offence to forge certificates, debentures, receipts, &c. mentioned in the acts. (d)

Some enactments respecting the forgery of *dividend warrants* have occurred in the statutes already mentioned. But there is a general provision as to the forgery of these instruments contained in the 45 Geo. 3. c. 89. s. 2.; which will be stated at large in the next chapter, as it relates not only to dividend warrants, but to the forgery of bank notes and other securities of the Bank of England.

Forgery of ex-
chequer bills.

The forgery or counterfeiting of any *exchequer bill* is made a capital felony by the several acts passed, usually every year, au-

(b) *Ante*, 388. The provision is the same as in 8 Geo. 1. c. 22. s. 1. with the addition of the word *interest*, to “annuities or dividends,” there mentioned.

(c) *Ante*, 390, *et sequ.*

(d) As in the 37 Geo. 3. c. 46. s. 3.

41 Geo. 3. c. 3. s. 4. 42 Geo. 3. c. 8. s. 26. 42 Geo. 3. c. 58. s. 20. 44 Geo. 3. c. 47. s. 25. 44 Geo. 3. c. 48. s. 20. 45 Geo. 3. c. 12. s. 25. 46 Geo. 3. c. 33. s. 25. 58 Geo. 3. c. 23. s. 38. 5 Geo. 4. c. 53. s. 22.

thorising the issue of such securities. Latterly it has been enacted, that the clauses of the 48 Geo. 3. c. 1., entitled, "An act for regulating the issuing and paying off of Exchequer bills," shall be extended to the acts subsequently passed; and one of those clauses (s. 9.) contains the following provision respecting the forgery, &c. of exchequer bills. It enacts, "that if any person "or persons shall forge or counterfeit any exchequer bill or any "indorsement or writing thereupon or therein, or tender in payment any such forged or counterfeited bill, or any exchequer bill with such counterfeit indorsement or writing thereon, or shall demand to have such counterfeit bill, or any exchequer bill with such counterfeit indorsement or writing thereupon, or therein, exchanged for ready money or for another exchequer bill, by any person or persons, body or bodies politic or corporate, who shall be obliged or required to exchange the same, or by any other person or persons whatsoever, knowing the bill so tendered in payment, or demanded to be exchanged, or the indorsement or writing thereupon or therein to be forged or counterfeited, and with intent to defraud his Majesty, his heirs and successors, or the persons to be appointed to pay off the same, or any of them, or to pay any interest thereupon, or the person or persons, body or bodies politic or corporate, who shall contract to circulate or exchange the same or any of them, or any other person or persons, body or bodies politic or corporate; then every such person or persons so offending, being thereof lawfully convicted, shall be adjudged a felon, and shall suffer "as in cases of felony without benefit of clergy."

41 Geo. 3. c. 1. s. 9. Persons forging exchequer bills, or demanding to have them exchanged, knowing, &c. guilty of felony without clergy.

In conclusion of this Chapter a case may be mentioned in which the forgery of a *transfer* of stock and the construction of the statute 33 Geo. 3. c. 30. s. 2. (e) came under consideration.

The indictment charged, that one William Harrison was possessed of and entitled to 50*l.* interest or share in the consolidated three per cent. annuities; and that whilst W. H. was so possessed of and entitled to the said 50*l.*, &c. the prisoner falsely made, forged, and counterfeited a transfer of the said 50*l.* interest or share, with the name of the said W. H. thereto subscribed, purporting to have been signed by the said W. H. and to be a transfer of the said 50*l.*, &c. from the said W. H. unto one W. W. the tenor of which was, &c. (setting it out); with intent to defraud the governor and company of the Bank of England, contrary to the form of the statute, &c. In other counts the intent was laid to be to defraud W. H. and W. W. and in others the prisoner was charged with publishing the transfer, knowing it to be forged, with the same intent. There were also further counts, charging the prisoner generally with forging a certain transfer, to wit, a transfer of an interest and share, *viz.* 50*l.* interest and share of and in certain annuities transferable at the Bank of England, commonly called consolidated three per cent. annuities, without stating to whom the stock belonged, or reciting the statutes relating thereto, in fraud of the same several persons. It appeared in evidence that the prisoner and one Henry Harland, were exe-

Gade's case. The prisoner being found guilty on an indictment charging him with forging a *transfer* of stock, objections that the stock had never been accepted by the person in whose name it stood, and that the transfer was not witnessed according to the rules and directions of the Bank, were overruled.

cutors of a person named John Howard, who had by his will given the 50*l.* in the three per cent. consols to his grandson, William Harrison, and that on the 11th January 1796, they transferred the same into the name of William Harrison; *but the transfer never was accepted by William Harrison.* Afterwards, on the 14th January, the prisoner brought his own son with him to the Bank, and represented him to be William Harrison; and, by the intervention of a broker, it was agreed that the stock should be sold to William West. The prisoner's son in his presence signed the transfer, which was properly filled up; but from the circumstance of his writing the name with a double *ss* (Harrisson), he was required to bring an affidavit that he was the person described in the books of the Bank, by the name of Harrison with a single *s*; and, in consequence, the broker did not pay over the money he had received from West for the stock, and the transfer was not witnessed. It appeared that according to the printed form of transfers used at the Bank they ought to be witnessed; and also, that there were positive orders at the Bank not to transfer any stock till it had been accepted. But this last rule was frequently departed from in transfers made with the stock-jobbers; and it was allowed by the rules that dividends should be received on stock before it was accepted. On behalf of the prisoner the stat. 33 Geo. 3. c. 28. was cited, which required that books should be kept at the Bank for the entering of all transfers, which should be conceived in proper words for that purpose, and signed by the parties making such transfers, and that the several persons to whom such transfers should be made should underwrite their acceptance thereof; and that no other method of transferring or assigning the said annuities should be good or available in law. (*f*) And it was objected that the evidence did not support the indictment; first, for want of Harrison's acceptance of the transfer made to him by the executors of Howard; which it was contended was necessary to make the transfer complete, and give Harrison possession of the 50*l.* stock; secondly, because no transfer at all could be made, until the stock was accepted; and, thirdly, that the transfer in the name of William Harrison was not witnessed, and therefore not available in law, and in fact no transfer; the witnessing being part of the words in which transfers were conceived. (*g*) The jury having found the prisoner guilty, sentence was respited in order that these objections might be submitted to the consideration of the twelve Judges. The case was argued before them at some length, the counsel for the prosecution relying in support of the indictment upon the second section of the 33 Geo. 3. c. 30.; (*h*) and ultimately the objections were all overruled, and the offence was holden to be complete. It is stated that Buller, J., in the June sessions, delivering the opinion of the Judges, observed as to the two first objections, that two answers had been given, first, that the stock vested in W. H.

(*f*) A clause similar in substance was enacted by the 35 Geo. 3. c. 14. s. 16., the 36 Geo. 3. c. 12. s. 16. and other statutes.

(*g*) The want of witnessing was

compared to the omissions in the bill of exchange in *Moffatt's case*, *ante*, 348.

(*h*) *Ante*, 390.

by the mere act of transferring it into his name, and that if he had died before he had accepted it, yet it would have gone to his executors as part of his personal estate; and, secondly, that the nature of the offence would not have been altered if W. H. had not had any stock standing in his name; for the transfer forged by the prisoner was complete on the face of it, and imported that there was such a description of stock capable of being transferred; that neither the forgery nor the fraud would have been less complete if Harrison had really had no stock. And as to the third objection, he said that the Judges were all of opinion that the entry and signatures, as stated in the indictment, were a complete transfer without the attestation of witnesses, which was no part of the instrument, but only required by the Bank for their own protection *ex abundanti cautela*.⁽ⁱ⁾

A case also has occurred in which *the endeavouring to receive, &c.* the money of a proprietor of stock, within the statute 31 Geo. 2. c. 22. came under consideration.

The prisoner, Francis Parr, applied to the clerk whose business it was to issue the dividend warrants upon the 3 per cent. consols stock, in the name of Isaac Hart, for a warrant for half-a-year's dividend; using the words "Isaac Hart, 3,900*l.*" He also signed the book "Isaac Hart:" and, being asked of what place? he said Windsor; which agreeing with the description in the book, a warrant was made out for 58*l.* 10*s.*, to which he again signed "Isaac Hart." The warrant was then delivered to him. A few minutes afterwards he was apprehended; and it did not appear that in the mean time he had made any application at the pay-office, or had even gone towards it, or taken any other step towards obtaining the actual payment of the money. It was objected by his counsel that some such proceeding was necessary to the completion of the offence: but after his conviction, the point being submitted to the consideration of the twelve Judges, they all held the conviction right; and Gould, J., in delivering their opinion, said, that the facts shewed that the prisoner, by personating the proprietor, and by obtaining and indorsing the warrant as such, thereby made an *endeavour*, as far as it went, towards receiving the dividend. ^(k)

Parr's case. The obtaining and indorsing a dividend warrant at the Bank, in the name of a stockholder, holden to be a personating of a proprietor, and thereby *endeavouring* to receive the dividend; though no attempt was made to receive the money at the pay-office.

⁽ⁱ⁾ Gade's case, O. B. Feb. 1796. East. T. 1796, and O. B. June 1796. 2 East. P. C. c. 19. s. 9. p. 874. 2 Leach 732.

^(k) Parr's case, O. B. 1787. Hil. T. 1787. 1 Leach 434. 2 East. P. C. c.

20. s. 2. p. 1005. In this case, J. Hart, the proprietor of the stock, was examined as a witness to prove the identity of the person intended to be defrauded.

CHAPTER THE THIRTY-FIFTH.

OF FORGING THE SECURITIES OF THE BANK OF ENGLAND.

8 & 9 W. 3.
c. 20. s. 36.
Forging the
common seal,
&c. of the
Bank of Eng-
land declared
to be felony
without clergy

Soon after the establishment of the Bank of England, it was thought necessary to make especial provision against the offence of forging its securities. By the 8 & 9 W. 3. c. 20. s. 36. the forging or counterfeiting the common seal of the corporation of the governor and company of the Bank of England, or of any sealed bank bill, made or given out in the name of the said governor and company for the payment of any sum of money, or of any bank note of any sort whatsoever, signed for the said governor and company, or the altering or rasing any indorsement on any bank bill or note of any sort, was declared felony without benefit of clergy.

Forging and
uttering bank
notes, &c.

By more modern statutes the forging of notes, dividend warrants, &c. of the Bank of England, and the disposing of such instruments, and the demanding any of the money, pretended to be due thereon, knowing them to be forged, have been made capital offences. The 15 Geo. 2. c. 13. s. 11. was for some time the existing law relating to these offences; but similar provisions to those which that statute contained are enacted in the more recent act of the 45 Geo. 3. c. 89.

45 Geo. 3. c.
89. s. 2. Per-
sons forging,
&c. any bank
note, &c. or
offering or
disposing of
them, know-
ing them to be
forged with
intent to de-
fraud, &c. to
be deemed
guilty of fe-
lony without
clergy.

The second section of the 45 Geo. 3. c. 89. enacts, "that if any person or persons shall forge, counterfeit, or alter any bank note, bank bill of exchange, dividend warrant, or any bond or obligation under the common seal of the governor and company of the Bank of England, or any indorsement thereon, or shall offer or dispose of or put away any such forged, counterfeited, or altered note, bill, dividend warrant, bond, or obligation, or the indorsement thereon, or demand the money therein contained or pretended to be due thereon, or any part thereof, of the said company, or any their officers or servants, knowing such note, bill, dividend warrant, bond, or obligation, or the indorsement thereon, to be forged, counterfeited, or altered, with intent to defraud the said governor and company, or their successors, or any other person or persons, body or bodies politic or corporate whatsoever, every person or persons so offending, and being thereof convicted in due form of law, shall be deemed guilty of felony, and shall suffer death as a felon without benefit of clergy."

The same statute of 45 Geo. 3. c. 89. also makes the knowingly purchasing or receiving forged bank notes, &c. or blank bank notes, &c. or having them in possession, knowing them to be forged, an offence of the degree of felony punishable by transportation for fourteen years.

The sixth section enacts, "That if any person or persons shall purchase or receive from any other person or persons any forged or counterfeited bank note, bank bill of exchange, bank post bill, or blank bank note, blank bank bill of exchange, or blank bank post bill, knowing the same to be forged or counterfeited, or shall knowingly or wittingly have in his, her, or their possession or custody, or in his, her, or their dwelling-house, out-house, lodgings, or apartments, any forged or counterfeited bank note, bank bill of exchange, or bank post bill, or blank bank note, blank bank bill of exchange, or blank bank post bill, knowing the same to be forged or counterfeited, (without lawful excuse, the proof whereof shall lie upon the person accused,) every person or persons so offending, and being thereof convicted according to law, shall be adjudged a felon, and shall be transported for the term of fourteen years." (a)

45 Geo. 3. c. 89. s. 6. Persons purchasing or receiving forged bank notes, &c. or having them in possession, knowing them to be forged, to be adjudged felons, and transported for fourteen years.

In a case upon this section, in which the circumstances necessary to constitute "the having in possession" of forged notes came under the consideration of the Judges, they seemed to be of opinion, that every uttering included having in custody and possession within the statute: and some of them thought, that without actual possession, if the notes had been put in any place under the prisoner's controul, and by his direction, the result would have been the same. (b)

The legislature have at different times endeavoured to prevent the forgery of the notes and bills of the Bank of England, by enacting that the making or having possession of instruments and materials fit for effecting such forgery shall be offences liable to very severe punishment.

The 13 Geo. 3. c. 79. s. 1. enacts, that "if any person or persons, (other than the officers, workmen, servants, or agents, for the time being, of the said governor and company, to be authorised and appointed for that purpose by the said governor and company, and for the use of the said governor and company only,) shall make or use, or cause or procure to be made or used, or knowingly aid or assist in the making or using; or (without being authorised and appointed as aforesaid), shall knowingly have in his, her, or their custody or possession, (without lawful excuse, the proof whereof shall lie upon the person accused,) any frame, mould, or instrument for the making of paper, with the words *Bank of England*, visible in the substance of such paper; or shall make, or cause or procure to be made, or knowingly aid or assist in the making any paper, in the substance of which the said words, *Bank of England*, shall

13 Geo. 3. c. 79. s. 1. Persons (not being officers, &c. of the Bank,) making or using, or knowingly having in possession, any frame, &c. for making paper, or any paper of a certain description, to be guilty of felony, and suffer death without clergy.

(a) A similar provision was contained in the 41 Geo. 3. c. 39. s. 5. but it may be considered as superseded with many other provisions which related to the prevention of the forgery

of Bank of England notes, &c. by the more recent statute 45 Geo. 3. c. 89.

(b) *Rex v. Rowley*, East. T. 1806. Russ. & Ry. 110.

“be visible; or if any person, (except as before excepted) shall, by any art, mystery, or contrivance, cause or procure the said words, *Bank of England*, to appear visible in the substance of any paper whatsoever, or knowingly aid or assist in causing the said words, *Bank of England*, to appear in the substance of any paper whatsoever; every person so offending in any of the cases aforesaid, and being thereof lawfully convicted, shall, for such offence, be deemed and adjudged a felon, and shall suffer death as in cases of felony, without benefit of clergy.”

13 Geo. 3. c. 79. s. 2. Persons, (not being authorised) who shall engrave in mezzotinto upon any plate any note, &c. containing the words *Bank of England*, or *Bank post-bill*, or any words expressing the amount of such note, &c. in white letters, or on a black ground: or using, or knowingly having such plate, &c. in their custody, or knowingly uttering any such note, &c. are to be committed to gaol for 6 months.

The second section of the same statute recites, that unwary and other persons had taken in payment, and otherwise had received notes, inland bills, and bills of exchange, with certain words and characters so nearly resembling the notes and bills of the said Governor and Company, as to appear to such persons to be the notes or bills of the Bank of England, which, if continued to be done, would be to the great prejudice of public credit; and then enacts, that “If any person or persons, without being authorised and appointed as aforesaid, shall engrave, cut, etch, or scrape in mezzotinto, or shall cause or procure to be engraved, cut, etched or scraped in mezzotinto, or shall knowingly aid or assist in the engraving, cutting, etching, or scraping in mezzotinto, in or upon any plate of copper, brass, steel, pewter, or of any other metal or mixture of metals, or upon wood, or any other material, or any plate whatsoever, any promissory note, inland bill or bill of exchange, or blank promissory note, inland bill or bill of exchange, or part of a promissory note, inland bill or bill of exchange, containing the words, *Bank of England*, or *Bank Post-bill*, or any word or words expressing the sum or amount, or any part of the sum or amount of such promissory note, inland bill or bill of exchange, in white letters or figures on a black ground; or shall use any such plate so engraved, cut, etched or scraped in mezzotinto, or shall use any other instrument for the making or printing any such promissory note, inland bill or bill of exchange or blank promissory note, inland bill or bill of exchange, or part of a promissory note, inland bill or bill of exchange; if any person, without being authorised and appointed as aforesaid shall knowingly have in his her or their custody, any such plate or instrument, or shall knowingly and wilfully utter or publish any such promissory note, inland bill or bill of exchange, blank promissory note, inland bill or bill of exchange; every such person so offending in any of the cases aforesaid, and being convicted thereof according to law, shall be committed to the common gaol of the county or place where the offence shall be committed, for any space not exceeding six months.”

In a case upon this enactment, it was holden that shewing to a person an instrument with an intent to raise a false idea of the party's substance, did not come within its provisions: and also that the leaving it afterwards, sealed up, with the person to whom it was shewn, under cover, that he might take charge of it, as being too valuable to be carried about, was not an uttering or publishing. (c)

By the third section it is provided, "That nothing herein contained shall extend, or be construed to extend to such person or persons who being at any time hereafter possessed of any such note or bill, shall only utter the same by carrying the same for payment to the issuer or issuers, drawer or drawers, acceptor or acceptors, indorser or indorsers thereof respectively, or using proper means to compel the payment of any such note or bill."

The 45 Geo. 3. c. 89. s. 3. enacts, "That if any person or persons, (other than the officers, workmen, servants, or agents, for the time being of the Governor and Company of the Bank of England, to be authorised and appointed for that purpose by the said Governor and Company and for the use of the said Governor and Company only,) shall make or use, or cause or procure to be made or used, or knowingly aid or assist in the making or using, or (without being authorised or appointed as aforesaid,) shall knowingly have in his, her or their custody or possession (without lawful excuse, the proof whereof shall lie upon the party accused) any frame, mould or instrument for the making of paper with curved or waving bar lines, or with the laying wire-lines thereof in a waving or curved shape, or with any number, sum, or amount, expressed in a word or words in Roman letters visible in the substance of such paper; or shall manufacture, make, use, vend, expose to sale, publish or dispose of, or cause or procure to be manufactured, made, used, vended, exposed to sale, published or disposed of, or aid or assist in the manufacturing, making, using, vending, exposing to sale, publishing, or disposing of, or (without being authorised or appointed as aforesaid) shall knowingly have in his, her, or their custody or possession, any paper whatsoever, with curved or waving bar-lines, or with the laying wire-lines thereof in a waving or curved shape, or having any number, sum or amount expressed in a word or words in Roman letters appearing visible in the substance of such paper; or if any person or persons (except as before excepted) shall, by any art, mystery, or contrivance, cause or procure the numerical sum or amount of any bank note, bank bill of exchange, or bank post-bill, blank bank note, blank bank bill of exchange or blank bank post-bill, in a word or words to appear visible in the substance of the paper whereon the same shall be written or printed, or shall knowingly aid or assist in causing the numerical sum or amount of any bank note, bank bill of exchange, or bank post-bill, blank bank note, blank bank bill of exchange, or blank bank post-bill, in a word or words in Roman letters, to appear visible in the substance of the paper whereon the same shall be written or printed, every person or persons so offending in any of the cases aforesaid, and being convicted thereof according to law, shall be adjudged a felon, and shall be transported for the term of fourteen years."

The fourth section of this act provides that nothing therein contained shall extend "to restrain or prevent any person or persons from issuing or negotiating any bill or bills of exchange, promissory note or promissory notes, having the sum or amount thereof expressed in guineas, or in a numerical figure or figures,

13 Geo. 3. c. 79. s. 3. provides that the act shall not extend to persons who, being possessed of such notes, &c. carry them to the issuers, &c. for payment.

45 Geo. 3. c. 89. s. 3. Persons, (other than officers of the Bank duly authorised,) making or using, or having in possession, any frame, &c. for making paper of a certain description, or manufacturing, having in possession, &c. certain paper, or causing the sum or amount of any bank note, &c. to appear in the substance of the paper, are made guilty of felony, and to be transported for fourteen years.

45 Geo. 3. c. 89. s. 4. Provides that the act is not to prevent persons from issuing, &c. any

bills of exchange or promissory notes, having the sum in guineas or in a numerical figure in pounds visible in the substance of the paper.

S. 5. provides that the act shall not prevent any persons from making, publishing, &c. any paper having waving lines, &c. not being bar-lines, or laying wire lines so that it do not resemble the paper of the Bank of England.

45 Geo. 3. c. 89. s. 7. Persons making, &c. upon any plate, &c. any notes, &c. purporting to be the notes, &c. of the Bank of England (without authority,) or using any such plate, &c. or knowingly having in their custody any such plate, &c. or uttering blank bank notes, parts of bank notes, &c. are to be adjudged felons, and transported for fourteen years.

52 Geo. 3. c. 138. s. 5. If any person

“denominating the sum or amount thereof, in pounds sterling, “appearing visible on the substance of the paper upon which the “same shall be written or printed.” And the fifth section provides also that the act shall not restrain or prevent any person or persons “from making, using, vending, exposing to sale, publishing or disposing of any paper having waving or curved lines, “or any other devices in the nature of water-marks visible in the “substance of the paper, not being bar-lines or laying wire lines, “provided the same are not contrived in such manner as to form “the ground work or texture of the paper, or to imitate or resemble the waving or curved laying wire lines or bar-lines of “the said paper of the Governor and Company of the Bank of “England, or to imitate or resemble the water-marks used by the “Governor and Company of the Bank of England in the bank “notes, bank bills of exchange, and bank post-bills, issued by the “said Governor and Company.”

The seventh section of this act relates to persons engraving plates, &c. and enacts “that if any person or persons shall engrave, cut, etch, scrape, or by any other means or device make, “or shall cause or procure to be engraved, cut, etched, scraped, “or by any other means or device made, or shall knowingly aid “or assist in the engraving, cutting, etching, scraping, or by any “other means or device, making, in or upon any plate of copper, “brass, steel, pewter, or of any other metal or mixture of metals, “or upon any wood or any other materials, or any plate whatsoever, any bank note, bank bill of exchange, bank post-bill, or “blank bank note, blank bank bill of exchange, or blank bank “post-bill, or part of a bank note, bank bill of exchange, or bank “post-bill, purporting to be the note, or bill of exchange, or bank “post-bill, or blank bank note, or blank bank bill of exchange, or “blank bank post-bill, or part of the note or bill of exchange, or “bank post-bill of the Governor and Company of the Bank of “England, without an authority in writing for that purpose from “the said Governor and Company of the Bank of England; or “shall use any such plate so engraved, cut, etched, scraped, or by “any other means or device made, or shall use any other instrument or device for the making or printing any such bank note, “bank bill of exchange, or bank post-bill, or blank bank note, or “blank bank bill of exchange, or blank bank post-bill, or part of “a bank note, or bank bill of exchange, or bank post-bill without “such authority in writing as aforesaid; or if any person or persons shall, without such authority as aforesaid, knowingly have “in his, her, or their custody, any such plate, instrument, or device, or shall, without such authority as aforesaid, knowingly, “and wilfully utter, publish, dispose of, or put away any such “blank bank note, blank bank bill of exchange, or blank bank “post-bill, or part of such bank note, bank bill of exchange, or “bank post bill, every person so offending in any of the cases “aforesaid, and being convicted thereof according to law, shall be “adjudged a felon, and shall be transported for the term of fourteen years.”

The 52 Geo. c. 138. s. 5. was passed for the further prevention of frauds practised by the imitation of the notes and bills of the

Bank of England. It enacts "that if any person shall engrave, "cut, etch, scrape, or by any other means or device make, or "shall cause or procure to be engraved, cut, etched, scraped, or "by any other means or device made, or shall knowingly aid or "assist in the engraving, cutting, etching, scraping, or by any "other means or device making, in or upon any plate of copper, "brass, steel, pewter, or of any other metal or mixture of metals, or upon wood or any other materials, or upon any plate "whatsoever, any word or words, figure or figures, character or "characters, the impression taken from which shall resemble or "be apparently intended to resemble the whole or any part of "any of the notes or bills of the said governor and company commonly called *bank notes and bank post bills*, or shall contain "any word, number, figure, or character, in white on a black, "sable, or dark ground, without an authority in writing for that "purpose from the said governor and company, to be produced "and proved by the party accused, or shall (without such authority as aforesaid) use any such plate, wood, or other material so "engraved, cut, etched, scraped, or by any other means or device made, or shall use any other instrument or device for the "making or printing upon any paper or other material, any word "or words, figure or figures, character or characters, which shall "be apparently intended to resemble the whole or any part of "any of the said notes or bills of the said governor and company, "or any word, number, figure, or character in white on a black, "sable, or dark ground; or if any person or persons shall (without such authority as aforesaid) knowingly have in his, her, or "their custody, any such plate, instrument, or device, or shall "knowingly and wilfully utter, publish or dispose of, or put away "any paper or other material containing any such word or words, "figure or figures, character or characters as aforesaid, or shall "knowingly or wittingly have in his, her, or their custody or possession any paper or other material containing any such word "or words, figure or figures, character or characters as aforesaid, "(without lawful excuse, the proof whereof shall lie upon the "person accused,) every person so offending in any of the cases "aforesaid, and being convicted thereof according to law, shall "be adjudged a felon, and shall be transported for the term of "fourteen years."

The sixth section provided that nothing in the act contained should apply to any paper or writing whatsoever, (other than papers or writings resembling such notes, or bills, as aforesaid), containing any impression from any plate or plates, or other device whatsoever, with white letters upon black, sable, or dark ground which should, previous to the passing of the act, have been in the custody of any person or persons whatsoever. (*d*)

shall engrave, &c. upon any plate, wood, &c. any words, &c. the impression from which shall resemble bank notes or bank post bills, or shall contain any words, &c. in white on a dark ground (without authority) or shall use any such plate, &c. or knowingly have in custody any such plate, &c. or knowingly utter or have in possession any paper or other material containing such words, &c. such offender shall be adjudged a felon, and transported for fourteen years.

S. 6. excepts paper (other than paper resembling notes or bills) in the custody of any person previous to the passing of the act.

(*d*) The 53 Geo. 3. c. 139. reciting this act, and that bankers had in ignorance of its provisions made and issued notes, containing white letters or figures on a dark ground, and that it was expedient to give a reasonable time to them to call in

such notes, and to issue others, enacted, that no person should be prosecuted under this act for having before the 53 Geo. 3. c. 139. engraved, &c. by authority of any persons acting as bankers, any note, &c. the impression taken from which might contain

1 G. 4. c. 92.
s. 1. Engraving, &c. on any plates for producing an impression of all or any part of a bank note of the bank of England without authority;

or using such plate;

or having such plate in custody; or uttering any impression from it:

transportation for fourteen years.

S. 2. Punishment of persons engraving, &c. on any plate any resemblance

The statute 1 G. 4. c. 92. after reciting the increase of the forgery of the notes of the Governor and Company of the Bank of England, and the difficulty of detection, and a new plan for printing such notes enacts (by s. 1.) "that if any person or persons (other than the officers, workmen, servants, and agents for the time being of the said Governor and Company, to be authorised and appointed for that purpose by the said Governor and Company, and for the use of the said Governor and Company, only,) shall engrave, cut, etch, scrape, or by any other art, means, or device make, or shall cause or procure to be engraved, cut, etched, scraped, or by any other art, means, or device made, or shall knowingly aid or assist in the engraving, cutting, etching, scraping, or by any other art, means, or device making in or upon any plate of copper, brass, steel, iron, pewter, or of any other metal or mixtures of metal, or upon wood or other materials, or any plate whatsoever, for the purpose of producing a print or impression of all or any part or parts of a bank note, or of a blank bank note, of the said Governor and Company, of the description aforesaid, without an authority in writing from the said Governor and Company, or shall use any such plate so engraved, cut, etched, scraped, or by any other art, means, or device made or shall use any other instrument or contrivance for the making or printing any such bank note or blank bank note, or part of a bank note of the description aforesaid; or if any person or persons shall from and after the passing of this act, without such authority as aforesaid, knowingly and without lawful excuse have in his, her, or their custody any such plate or instrument, or, without such authority as aforesaid, shall knowingly or wilfully utter, publish, dispose of or put away any such blank bank note, or part of such bank note, of the description aforesaid, every person so offending in any of the cases aforesaid, and being thereof convicted according to law, shall be adjudged a felon, and shall be transported for the term of fourteen years."

The second section of the same statute after reciting that divers frauds had been practised by making and publishing papers with certain words and characters so nearly resembling the notes of the Governor and Company of the Bank of England, as to appear, to ignorant and unwary persons, to be the notes of the said Go-

any word, &c. in white on a dark ground, or for having made or printed by such authority, before the passing of the 53 Geo. 3. c. 139. any such note, &c. or issued, or had the same in their possession, or who should before the 1st of November, 1816, issue or have in their possession any such note, the date whereof should not be later than the 1st November, 1813. But it provided, that nothing therein contained should repeal or suspend any provision of this act respecting the engraving, &c. any words, &c. the impression taken from which might resemble Bank of England notes, or

post-bills, or the using any plate or other material, upon which any such word, &c. might be engraved, &c. or the using any other instrument or device for making or printing any such word, &c. or the having any such plate, instrument, or device in possession, or the uttering, &c. or having in possession any paper or other material containing any such word, &c.: and it provided also, that nothing therein contained should repeal or suspend any enactment, &c. contained in the 13 Geo. 3. c. 79. (*ante*, 397, *et sequ.*)

vernor and Company; and that it was necessary for the security of the public that such practices as applied to the notes of the said Governor and Company of the aforesaid description should be prevented, enacts, "that if any person or persons from and after the "passing of the act, shall engrave, cut, etch, scrape, or by any "other art, means, or device make, or shall cause or procure to "be engraved, cut, etched, scraped, or by any other art, means "or contrivance made, or shall knowingly aid or assist in the en- "graving, cutting, etching, scraping, or by any other art, means, "or contrivance making, in or upon any plate of copper, brass, "steel, iron, pewter, or of any other metal or mixture of metals, "or upon wood or any other materials, or upon any plate what- "soever, any line work, as or for the ground work of a promis- "sory note or bill of exchange, the impression taken from which "line work shall be intended to resemble the ground work of a "bank note of the said Governor and Company of the descrip- "tion aforesaid, or any device the impression taken from which "shall contain the words 'Bank of England,' in white letters, "upon a black, sable, or dark ground, either with or without "white or other lines therein, or shall contain in any part thereof "the numerical sum or amount of any promissory note or bill of "exchange in black and red register work, or shall shew the "reversed contents of a promissory note or bill of exchange, or "of any part of a promissory note or bill of exchange, or shall "contain any word or words, figure or figures, character or cha- "racters, pattern or patterns, which shall be intended to resem- "ble the whole or any part of the matter or ornaments of any "bank note of the description aforesaid, or shall contain any "word, number, figure, or character in white, on a black, sable, "or dark ground, either with or without white or other lines "therein, which shall be intended to resemble the numerical "sum or amount in the margin, or any other part of the bank "note of the said Governor and Company, without an author- "ity in writing for that purpose from the said Governor and "Company, to be produced and proved by the party accused; "or if any person or persons shall, from and after the passing of "this act, (without such authority as aforesaid,) use any such plate, "wood, or other materials, so engraved, cut, etched, scraped or "by any other art, means, or contrivance made, or shall use any "other instrument or contrivance for the making or printing upon "any paper or other material, any word or words, figure or figures, "character or characters, pattern or patterns, which shall be in- "tended to resemble the whole or any part of the matter or or- "naments of any such note of the said Governor and Company, "of the description aforesaid, or any word, figure, or character, "in white, on a black, sable, or dark, ground, either with or with- "out white or other lines therein, which shall be apparently in- "tended to resemble the numerical sum or amount in the margin, "or any other part of any bank note of the said Governor and "Company; or if any person or persons shall, from and after the "passing of this act, without such authority as aforesaid, know- "ingly have in his, her, or their custody or possession, any such "plate or instrument, or shall knowingly and wilfully utter, pub-

of ground
work intended
to resemble
the ground
work of a
Bank of Eng-
land note,
without the
authority of
the Bank;

or using such
plate, &c.

or having such
plate in pos-
session, or ut-
tering any im-
pression from
it:

“lish or dispose of, or put away any paper or other material containing any such word or words, figure or figures, character or characters, pattern or patterns as aforesaid, or shall knowingly or willingly have in his, her, or their custody or possession any paper or other material containing any such word or words, figure or figures, character or characters, pattern or patterns as aforesaid, (without lawful excuse, the proof whereof shall lie upon the person accused,) every person so offending in any of the cases aforesaid, and being convicted thereof according to law, shall be adjudged a felon, and shall be transported for the term of fourteen years.”

transportation for fourteen years.

S. 3. provides that the Bank may cause an impression to be made upon the note by machinery in lieu of signature by hand-writing.

The third section of the same statute after reciting that it was expedient that the name or names of the person or persons intrusted and authorised by the said Governor and Company to sign bank notes on behalf of the said Governor and Company, should be impressed by machinery upon bank notes of the description aforesaid in such form as might from time to time be adopted by the said Governor and Company, instead of being subscribed in the hand-writing of such person or persons, respectively, and that doubts might arise respecting the validity of such notes; enacts, “that all bank notes of the said Governor and Company of the description aforesaid, whereon the name or names of any person or persons instructed or authorised to sign such notes on behalf of the said Governor and Company shall or may be impressed by machinery provided for that purpose by the said Governor and Company, and with the authority of the said Governor and Company, shall be and be taken to be good and valid to all intents and purposes, as if such notes had been subscribed in the proper hand-writing of the person or persons intrusted or authorised by the said Governor and Company to sign the same respectively, and shall be deemed and taken to be bank notes within the meaning of all laws and statutes whatsoever, and shall and may be described as bank notes in all indictments and other criminal and civil proceedings whatsoever; any law, statute, or usage to the contrary notwithstanding.”

Cases upon these statutes.

A case has been already noticed in which it was holden, upon one of the statutes relating to forgeries upon the Bank of England, namely, the 8 & 9 W. 3. c. 20. s. 36., (e) that the expunging by means of lemon-juice an indorsement on a bank note, was holden to be a *raising* of the indorsement. (f) And in the enquiry in a former chapter as to the resemblance which the forged instrument must bear to one that is genuine, a case upon the statute 15 Geo. 2. c. 13. s. 11. (g) was mentioned, where it was holden that the resemblance to a bank note must appear on the face of the instrument; and that a signature “for Self and Co. of my bank in England,” did not support an allegation that the paper purported to be a bank note: and further, that the representation of the prisoner could not alter the purport of the instrument. (h)

(e) *Ante*, 396.

(f) *Rex v. Bigg*, 3 P. Wms. 419. *Ante*, 320.

(g) *Ante*, 396.

(h) *Jones's case*, *ante*, 346.

Amongst the few reported decisions upon the particular construction of these statutes, it appears to have been holden that a person knowingly delivering a forged bank note to another, for the purpose of its being knowingly uttered by such person, might, in case the note were uttered accordingly, be convicted of having "disposed of and put away" such note within the statute 15 Geo. 2. c. 13. s. 11.; the provisions of which are contained, as has been before observed, in the more recent statute 45 Geo. 3. c. 89. s. 2. (i) The indictment charged the two prisoners, John Palmer and Sarah Hudson, in one of several counts, with feloniously disposing of and putting away a forged bank note, knowing it to be forged. Upon the evidence it appeared, that the prisoner Palmer had been in the habit of putting off forged bank notes, and had employed the prisoner Hudson in putting them off; that on a certain day being at a public-house, he sent out Hudson with the forged note in question, for the purpose of passing it; that she went to a neighbouring shop, purchased some handkerchiefs for six shillings, and tendered the note in payment, which was suspected and stopped, and upon examination appeared to be forged; that on the evening of the same day, Palmer went with her to the shop; and when he got there said, "This woman has been here to-day, and offered a two pound note which you have stopped; it is my note, and I must have either the note or the change."

Upon these facts it was objected by the counsel for the prisoners, that the evidence related to two distinct and separate offences, and not to one joint offence; and the learned Judge directed the jury to consider whether the woman was guilty of uttering the note at the shop, or the man of disposing of it to her; but told them that they could not convict both; that the man could not be convicted, unless they were satisfied that he gave the very note stated in the indictment to the woman for a fraudulent purpose, knowing it to be a bad one; nor the woman, unless they were satisfied that she put the note away knowing it to be forged; and that they must consider which they would convict, if either appeared to be guilty. The jury acquitted the woman, and found Palmer guilty; but judgment was respited, in order that the opinion of the Judges might be taken upon the question, whether the evidence given would support the conviction. Their opinion was afterwards delivered by Rooke, J., who first stated with respect to one of the counts in the indictment which charged the prisoners with uttering and publishing the note as true, knowing it to be forged, that it seemed to be the general opinion of the Judges, that if the woman had not known the note to be forged, Palmer might have been rightly convicted on that count; according to the doctrine, that where an innocent person is employed for a criminal purpose, the employer must be answerable: (k) but as it appeared that she knew the note to be forged, the Judges had formed no opinion upon the evidence as applying to that count, thinking it sufficient to consider the case upon the count which charged the prisoners with disposing of and putting away the note in question. He then proceeded to state, that upon the point whether the facts

Palmer and Hudson's case.

Where one of the prisoners knowingly delivered a forged bank note to the other prisoner for the purpose of its being knowingly uttered, by her, and she uttered it accordingly, it was holden that the prisoner, who delivered such note, might be convicted of having "disposed of and put away" the same on the statute 15 Geo. 2. c. 13. s. 11.

(i) *Ante*, 396, *et sequ.*

(k) *Fost.* 349. *Ante*, Vol. I. p. 423.

amounted to a disposing of, or putting away, within the meaning of the 15 Geo. 2. c. 13. s. 11., there had been a considerable difference of opinion amongst the Judges. That some of them had holden, that this was not an offence within the statute; because till the woman had uttered the note it ought to be considered as in the possession of the man; and when she did utter it, the man was only an accessory before the fact, and should have been so indicted. But that the majority of the Judges were of opinion that the conviction was right. And as to the constructive possession, he observed, that it is by fiction of law only that when the actual possession is in one person the constructive possession shall be considered in another; and that these fictions are adopted for the sake of promoting justice, but ought not to be adopted when they tend to defeat that purpose. (I)

Holden's case. In an indictment for disposing of, and putting away, forged bank notes, knowing, &c. it is not necessary to aver to whom the notes were so disposed.

And this offence may be completed, though it appear that the notes were furnished by the prisoners to agents employed by the Bank to procure them from the prisoners, and that the notes were delivered to such agents as forged notes, for the purpose of being disposed of by them.

In a more recent case upon the statute 45 Geo. 3. c. 89. s. 2. (n) an objection was taken to the indictment, that it did not point out the name of the person to whom the forged note was disposed: but, upon argument in the Exchequer Chamber before the twelve Judges, Lord Ellenborough, C. J., observed, that the indictment contained every word which the statute uses for constituting the offence; and that the statute did not contain the words, "to any person or persons;" but to put off with intent to defraud the governor and company of the Bank of England; and the Judges held the indictment to be sufficient. (o)

Another point arose in the same case, upon the evidence; from which it appeared that the notes, which the prisoners were charged with having disposed of and put away, were furnished by the prisoners in consequence of an application made to them by agents employed for that purpose by the Bank, and that they were delivered to such agents as forged notes, for the purpose of being disposed of by them. The facts were, that in consequence of a great number of forged notes having been circulated in the neighbourhood, two persons, named Shaw and Whitehead, were employed by the magistrates, with the approbation of the agents for the Bank, to detect those who were suspected to be the utterers. The prisoners did not pay the notes to Shaw and Whitehead as genuine; but those persons, for the purpose of detection, applied to the prisoners, as supposed dealers in forged bank notes, to purchase them; and the prisoners accordingly procured them, and sold them as forged notes; so that Shaw and Whitehead were not deceived or defrauded in any of the instances, nor were any of the

(I) *Rex v. Palmer and Hudson*, 1804. 1 New R. 96. 2 Leach 978. Russ. & Ry. 72. Thomson, B., Lawrence, J., Le Blanc, J., and Chambre, J., were of opinion that the conviction was wrong.

(n) *Ante*, 396.

(o) *Rex v. Holden and Others*, cor. Chambre, J., Lancaster Sum. Ass. 1809, and argued before the Judges, Mich. T. 1809. 2 Taunt 334. 2 Leach 1019. Russ. & Ry. 154. The count in question in the indictment charged that the prisoner "on, &c. with force

"and arms at, &c. feloniously did dispose of, and put away a certain false, forged, and counterfeit bank note, the tenor of which was as followeth, (an exact copy set out.) with intent to defraud the governor and company of the Bank of England, he (the prisoner) at the time of his so disposing of and putting away the same forged and counterfeit bank note, then and there well knowing such last mentioned note to be forged and counterfeited against the form of the statute, &c."

prisoners the first movers in the transaction they had with them; nor did it appear, by any direct evidence, that either of the prisoners, when he was first applied to, had any of the notes in his actual possession; but they respectively produced them at meetings which took place subsequent to such first application. Upon this evidence, it was objected on behalf of the prisoners, that there was no sufficient disposing of the notes, inasmuch as the prisoners were solicited to commit the act proved against them by the Bank themselves, by means of their agents. The objection was overruled by the learned Judge who tried the prisoners; but he thought proper to respite their sentence, in order that the point might be considered by the twelve Judges; who held the conviction right. (p)

We have seen that the offering, disposing of, receiving, or having possession of forged bank notes, &c. *knowing the same to be forged*, are made substantive offences by the statutable enactments, which have been cited; (q) and the knowledge of the forgery, or, as it is commonly termed, *the guilty knowledge*, will of course, in prosecutions for such offences, form a most material part of the enquiry. The principal cases upon this subject are mentioned in a former chapter, treating generally of the crime of forgery. (r)

Evidence of guilty knowledge where the party is charged with uttering, &c. forged notes, &c. knowing the same to be forged.

In a case where the Bank of England had preferred a bill of indictment for the capital offence of disposing of and putting away forged Bank of England notes; and also another bill against the same prisoners for the transportable offence of having the same notes in their possession, knowing them to be forged, and had elected to proceed on the latter indictment, it was holden, that although facts sufficient to support the capital charge were made out in evidence, an acquittal for such minor offence ought not to be directed, because the whole of the minor offence was proved, and it did not merge in the capital offence. And that the Bank might elect to proceed on indictments for the lesser offence, although indictments have been found for the capital charge. (s)

Bank prosecutions. Practice. Election to proceed for minor offence.

It was also holden in the same case, that it is not necessary that the signing clerk at the Bank should be produced, if witnesses acquainted with his handwriting state that the signature to the note is not his handwriting. (t)

Signing clerk not a necessary witness.

(p) *Reg v. Holden and Others, ante, note (b).*

(q) *Ante, 396, et sequ.*

(r) *Ante, Chap. xxii. p. 383.*

(s) *Case of Bank Prosecutions, Russ. & Ry. 378.*

(t) *Id. Ibid.*

CHAPTER THE THIRTY-SIXTH.

OF FORGING THE SECURITIES OF OTHER PUBLIC COMPANIES.

Forging the seal, bond, &c. of the *South Sea Company*; or demanding payment on a forged bond, &c. 9 Anne, c. 21. s. 57.

THE statute 9 Anne, c. 21. s. 57. relates to forgeries upon the *South Sea Company*, and enacts, "That if any person or persons
 " shall forge or counterfeit the common seal of the said company,
 " or shall forge, counterfeit, or alter any bond or obligation under
 " the common seal of the said company; or shall offer to dispose
 " of or pay away any such forged, counterfeited, or altered bond,
 " (knowing the same to be such,) or shall demand the money
 " therein contained or pretended to be due thereon, or any part
 " thereof, of the said company, or any of their officers, (knowing
 " such bond or obligation to be forged, counterfeited, or altered,)
 " with intent to defraud the said company or their successors, or
 " any other person or persons whatsoever," every such offender
 shall be guilty of felony, without benefit of clergy. And the 6 Geo.
 1. c. 4. s. 56. contains similar provisions.

Forging receipts or warrants of the *South Sea Company*. 6 G. 1. c. 11. s. 50.

The statute 6 Geo. 1. c. 11. s. 50. recites that the *South Sea Company* might issue out receipts under the hand or hands of one or more of their officers, from time to time, upon or for subscriptions to be taken by the said company for increasing their capital, pursuant to the 6 Geo. 1. c. 4., and might also issue out warrants under the hand or hands of one or more of their officers, for the dividend from time to time to be made to the proprietors of the stock of the said company; and then enacts, "That if any
 " person or persons shall forge, counterfeit, or alter any such re-
 " ceipt or receipts, warrant or warrants, or any indorsement or
 " writing, indorsements or writings thereupon or therein, or shall
 " tender any such forged, counterfeited, or altered receipt or
 " receipts, warrant or warrants, or any such receipt or receipts,
 " warrant or warrants, with such counterfeit indorsement or writ-
 " ing thereon or therein, knowing the same to be so forged, coun-
 " terfeited, or altered, to the said company, or any of their offi-
 " cers, or shall offer to alienate or dispose of the same, knowing
 " the same to be forged, counterfeited, or altered, and with intent
 " to defraud the said company, or any other person or persons,
 " bodies politic or corporate," every such person so offending
 shall be adjudged a felon, without benefit of clergy.

The statute 12 Geo. 1. c. 32. s. 9. relates to the *East India* as well as the *South Sea* company; and enacts, "That if any person or persons shall forge or counterfeit or procure to be forged or counterfeited or willingly act or assist in the forging or counterfeiting any bond or obligation under the common seal of the united company of merchants of England trading to the East Indies, or any indorsement or assignment thereon, or on any bond or obligation under the common seal of the governor and company of merchants of Great Britain, trading to the South Seas and other parts of America, and for encouraging the fishery; or shall utter or publish any such, knowing the same to be forged or counterfeited, with intention to defraud any person (a) whatsoever;" every such person so offending shall be guilty of felony, without benefit of clergy.

Forging, &c. the bond of the *East India Company*, or *South Sea Company*. 12 Geo. 1. c. 32. s. 9.

Especial provisions have also been made respecting forgeries affecting some of the Insurance companies; (b) the English Linen Company, (c) the British Society for extending the Fisheries, &c. (d) and the Governor and Company of the British cast Plate Glass Manufactory. (e) And the statute-books probably contain provisions of a similar kind relating to other public companies, not requiring particular notice in this Work; and which indeed may be considered as having been rendered of less importance by the general statutes applying to forgeries committed with the intention of defrauding any corporation whatsoever. (f)

Forgeries upon *Insurance Companies*, &c.

(a) It is observed in 2 East. P. C. c. 19. a. 14. p. 886, note (a), that the word *person* does not seem an appropriate term, as applied to the subject matter; namely, a corporation: but that this seems included in the general acts of the 2 Geo. 2. c. 25. and 31 Geo. 2. c. 22. s. 78. But see *ante*, 369.

(b) By 6 Geo. 1. c. 18. s. 13. as to forging the securities of the *London and Royal Exchange Assurance Com-*

panies; and by 39 Geo. 3. c. 83. s. 22. (public, local, and personal act.) as to forging those of the *Globe Insurance Company*.

(c) 4 Geo. 3. c. 37. s. 15.

(d) 26 Geo. 3. c. 106. s. 26.

(e) 13 Geo. 3. c. 38. s. 28. revived by 38 Geo. 3. c. 17. s. 23. (public, local, and personal act.)

(f) *Post. Chap. Of the Forgery of Private Papers, &c.*

CHAPTER THE THIRTY-SEVENTH.

OF FORGING AND TRANSPOSING STAMPS.

The forging, transposing, &c. of stamps, in general made capital offences, by various statutes.

52 Geo. 3. c. 143. s. 1. enacts, that offences in breach of, or in resistance to, the revenue laws, shall be felonies with benefit of clergy, unless declared to be felony without benefit of clergy by this act.

52 Geo. 3. c. 143. s. 7. Forging, &c. marks, stamps, &c. used by the commissioners of the duties on vellum, paper, &c. for denoting the duties, or for denoting any device for the Ace of Spades, in any playing

THE various statutes by which stamps, marks, &c. have been required to be affixed to written instruments, plate, or other articles, in order to denote the payment of the duties imposed thereon by the legislature, have made the forging or counterfeiting such stamps, marks, &c. offences of a very high degree; and, in general, punishable with death. And in some of the statutes are included the offences of transposing stamps, and knowingly uttering and selling articles with the impression of a forged or counterfeited stamp, &c. upon them; and the privately or secretly using any genuine stamps, &c. for the purpose of defrauding the crown. The recent statute, 52 Geo. 3. c. 143. embraces offences of this description; having first enacted, in the following words, "That, in all cases where any act to be done or committed in breach of or in resistance to any part of the laws for collecting his Majesty's revenue in Great Britain, would by the laws now in force subject the offender to suffer death, as guilty of felony, without benefit of clergy, by virtue of the said laws, or any of them, such act, so to be done or committed, shall be deemed and taken to be felony with benefit of clergy, and punishable only as such, unless the same shall also be declared to be felony without benefit of clergy by this act."

This statute then enacts, "That if any person shall forge, or counterfeit, or cause or procure to be forged or counterfeited, any mark, stamp, die, or plate, which in pursuance of any act or acts of parliament shall have been provided, made or used by or under the direction of the commissioners appointed to manage the duties on stamped vellum, parchment and paper, or by or under the direction of any other person or persons legally authorised in that behalf, for expressing or denoting any duty or duties, or any part thereof, which shall be under the care and management of the said commissioners, or for denoting or testifying the payment of any such duty or duties, or any part thereof, or for denoting any device appointed by the said commissioners for the Ace of Spades, to be used with any playing

“ cards ; or shall forge or counterfeit, or cause or procure to be
 “ forged or counterfeited, the impression, or any resemblance of
 “ the impression, of any such mark, stamp, die or plate as afore-
 “ said, upon any vellum, parchment, paper, card, ivory, gold or
 “ silver plate, or other material, or shall stamp or mark, or cause
 “ or procure to be stamped or marked, any vellum, parchment,
 “ paper, card, ivory, gold or silver plate, or other material, with
 “ any such forged or counterfeited mark, stamp, die or plate as
 “ aforesaid, with intent to defraud his Majesty, his heirs, &c. of
 “ any of the duties, or any part of the duties under the care and
 “ management of the said commissioners ; or if any person shall
 “ utter or sell, or expose to sale any vellum, parchment, paper,
 “ card, ivory, gold or silver plate, or other material, having there-
 “ upon the impression of any such forged or counterfeited mark,
 “ stamp, die or plate, or any such forged or counterfeited im-
 “ pression as aforesaid, knowing the same respectively to be
 “ forged or counterfeited ; or if any person shall privately or se-
 “ cretly use any such mark, stamp, die or plate, which shall have
 “ been so provided, made or used, by or under such direction as
 “ aforesaid, with intent to defraud his Majesty, his heirs, &c.
 “ of any of the duties, or any part of the duties under the care
 “ and management of the said commissioners ; every person
 “ so offending, shall be adjudged guilty of felony, without benefit
 “ of clergy.”

cards ; or forg-
 ing, &c. the
 resemblance of
 such marks,
 stamps, &c.
 upon vellum,
 paper, card,
 ivory, gold or
 silver plate,
 &c. ; or utter-
 ing, &c. with
 forged marks,
 &c. or secretly
 using them ;
 made felony
 without cler-
 gy.

The eighth section of this statute enacts, “ That if any person
 “ shall transpose or remove, or cause or procure to be transposed
 “ or removed, from one piece of wrought plate of gold or silver to
 “ another, or to any vessel or ware of base metal, any impression
 “ made with any mark, stamp or die, provided, made or used by
 “ or under the direction of the said commissioners of stamps, or
 “ by or under the direction of any other person or persons legally
 “ authorised in that behalf, for denoting any duty or duties, or
 “ the payment of any duty or duties, granted to his Majesty on
 “ gold or silver plate ; or shall stamp or mark, or cause or pro-
 “ cure to be stamped or marked, any vessel or ware of base metal
 “ with any mark, stamp or die, which shall have been forged or
 “ counterfeited in imitation of, or to resemble any mark, stamp
 “ or die so provided, made or used as aforesaid ; or shall sell, ex-
 “ change or expose to sale, or export out of Great Britain, any
 “ wrought plate of gold or silver, or any vessel or ware of base
 “ metal, having thereupon the impression of any forged or coun-
 “ terfeited mark, stamp or die, for denoting any such duty or
 “ duties, or the payment of any such duty or duties, or any
 “ forged or counterfeited impression of any mark, stamp or die,
 “ so provided, made or used as aforesaid, or any impression of
 “ any such mark, stamp or die, which shall have been transposed
 “ or removed from any other piece of plate as aforesaid, knowing
 “ the same respectively to be forged or counterfeited, or trans-
 “ posed or removed as aforesaid ; or shall wilfully and without
 “ lawful excuse (the proof whereof shall lie on the person ac-
 “ cused) have or be possessed of any such forged or counterfeited
 “ mark, stamp or die, for denoting any such duty or duties, or the

52 Geo. 3. c.
 143. s. 8.
 Transposing
 from one piece
 of wrought
 plate to an-
 other, or to
 base metal,
 any mark,
 stamp, &c. : or
 marking base
 metal with
 forged mark,
 stamp, &c. ;
 or selling or
 exporting
 wrought plate
 or base metal,
 with forged
 mark, stamp,
 &c. ; or trans-
 posed mark,
 stamp, &c. ;
 knowing, &c. ;
 or wilfully hav-
 ing possession
 of any forged
 mark, stamp,
 &c. ; made fe-
 lony without
 clergy.

52 Geo. 3. c. 143. s. 9. Making or having in possession any frame, &c. for paper, &c. or making paper, &c. with the words, "Excise Office," visible in the substance; or engraving, making, &c. any marks, stamp, &c. in imitation of the mark, stamp, &c. used by the commissioners of Excise for paper used for permits, made felony without clergy.

"payment thereof;" every person so offending shall be adjudged guilty of felony, without benefit of clergy. (a)

By the ninth section it is enacted, "that if any person (not being lawfully appointed or authorised so to do) shall make, or cause, or procure to be made, or shall knowingly aid or assist in the making, or, without being so appointed or authorised as aforesaid, shall knowingly have in his, her or their custody or possession, without lawful excuse (the proof whereof shall lie on the person accused,) any frame, mould, or instrument, for the making of paper, with the words 'Excise Office' visible in the substance of such paper, or shall make or cause, or procure to be made, or knowingly aid or assist in the making any paper, in the substance of which the words 'Excise Office' shall be visible; or if any person (except as before excepted) shall by any art, mystery or contrivance, cause or procure the said words 'Excise Office' to appear visible in the substance of any paper whatever; or if any person (not being so appointed or authorised as aforesaid) shall engrave, cast, cut, or make, or shall cause or procure to be engraven, cast, cut, or made, any mark, stamp, or device, in imitation of or to resemble any mark, stamp, or device, made or used by the direction of the commissioners of excise in England or Scotland, or the major part of them respectively, for the purpose of printing, stamping, or marking of any paper to be used as or for a permit or permits to accompany any exciseable commodity or commodities removing or removed from one part of Great Britain to any other part thereof, in pursuance of the directions of any of the several statutes requiring such permit," every person so offending shall be adjudged guilty of felony without benefit of clergy.

55 Geo. 3. c. 184. s. 7. includes the cutting or getting off the impression of any stamp from paper, &c. with intent to use the same upon any other paper, &c. chargeable with the duties, and makes such cutting, getting off, &c. felony without clergy.

The late stamp act 55 Geo. 3. c. 184. s. 7. includes the cutting or getting off the impression of any stamp from paper, &c. with intent to use the same upon any other paper, &c. chargeable with the duties thereby granted; and makes this also a capital offence. This section (without referring to the former general act of the 52 Geo. 3. c. 143.) enacts "that if any person shall forge or counterfeit, or cause or procure to be forged or counterfeited, any stamp or die, or any part of any stamp or die, which shall have been provided, made or used, in pursuance of this act, or in pursuance of any former act or acts, relating to any stamp duty or duties, or shall forge, counterfeit or resemble, or cause or procure to be forged, counterfeited or resembled the impression or any part of the impression of any such stamp or die as aforesaid, upon any vellum, parchment or paper, or shall stamp or mark, or cause or procure to be stamped or marked, any vellum, parchment or paper, with any such forged or counterfeited stamp or die, or part of any stamp or die as aforesaid, with intent to defraud his majesty, his heirs, &c. of any of the duties hereby granted, or any part thereof; or if any person shall utter or sell or expose to sale any vellum, parchment, or paper, having there-

(a) See 5 Geo. 4. c. 52. (local and personal) s. 22. as to plate wrought or made within the town of *Birmingham*, and within thirty miles thereof.

“ upon the impression of any such forged or counterfeited stamp
 “ or die, or part of any stamp or die, or any such forged, counter-
 “ feited or resembled impression, or part of impression as afore-
 “ said, knowing the same respectively to be forged, counterfeited
 “ or resembled; or if any person shall privately and secretly use
 “ any stamp or die which shall have been so provided, made or
 “ used as aforesaid, with intent to defraud his majesty, his heirs,
 “ &c. of any of the said duties, or any part thereof; or if any per-
 “ son shall fraudulently cut, tear, or get off, or cause or procure
 “ to be cut, torn or got off, the impression of any stamp or die
 “ which shall have been provided, made or used in pursuance of
 “ this or any former act, for expressing or denoting any duty or
 “ duties under the care and management of the commissioners of
 “ stamps, or any part of such duty or duties, from any vellum,
 “ parchment, or paper, whatsoever, with intent to use the same
 “ for or upon any other vellum, parchment, or paper, or any in-
 “ strument or writing, charged or chargeable with any of the
 “ duties hereby granted; then and in every such case every per-
 “ son so offending, and every person knowingly and wilfully aid-
 “ ing, abetting, or assisting any person or persons in committing
 “ any such offence as aforesaid,” shall be adjudged “ guilty of fe-
 “ lony without benefit of clergy.” The eighth section enacts that
 all the powers, &c. pains and penalties contained in and imposed
 by the several acts relating to the duties by this act repealed, and
 the several acts relating to any prior duties of the same kind or
 description, shall be of full force and effect with respect to the
 duties by this act granted, as far as the same shall be appli-
 cable, &c.

S. 8. Powers
of former acts
extended.

The statute 55 Geo. 3. c. 185. entitled “ an act for repealing the
 “ stamp office duties on advertisements, almanacks, newspapers,
 “ gold and silver plate, stage-coaches, and licences for keeping
 “ stage-coaches, now payable in Great Britain; and for grant-
 “ ing new duties in lieu thereof,” declares that the duties thereby
 granted shall be under the care and management of the commis-
 sioners of stamps in *Great Britain*, and requires the commis-
 sioners to provide and use proper and sufficient plates, stamps,
 or dies, for denoting the duties thereby granted: (b) and enacts
 that the powers, &c. pains and penalties contained in and im-
 posed by the acts relating to the duties by this act repealed, and
 to any prior duties of the same kind or description, shall be
 of full force and effect, with respect to the duties by this act
 granted as far as the same shall be applicable, &c. (c) The sixth
 section then enacts, “ that if any person shall forge or counterfeit,
 “ or cause or procure to be forged or counterfeited, any plate,
 “ stamp, or die, or any part of any plate, stamp, or die, which
 “ shall have been provided, made or used, in pursuance of this
 “ or any former act, for expressing and denoting any of the
 “ duties granted by this or any former act, on almanacks, news-
 “ papers, and licences to keep stage-coaches; or shall forge,
 “ counterfeit, or resemble, or cause or procure to be forged, coun-
 “ terfeited, or resembled, the impression, or any part of the im-

55 Geo. 3. c.
185. grants
new duties on
advertisements, alma-
nacks, news-
papers, plate,
coaches, &c.

S. 6. enacts
that persons
forging, &c.
any plate,
stamp, or die,
used to denote
the duties on
almanacks, &c.
or forging the
impression
thereof, or
stamping any
paper with

such forged plate, stamp, or die, or uttering such paper, knowing, &c. or secretly using any plate, stamp, or die, and their aiders, &c. shall be guilty of felony without clergy.

55 Geo. 3. c. 185. s. 7. Any person forging, &c. any mark, stamp, or die used for plate, or forging, &c. the impression of such mark, &c. upon plate, or stamping plate or base metal with a forged mark, stamp, or die, or transposing from one piece of plate to another, or to base metal any impression of a mark, stamp, or die, or selling or exporting plate or base metal, with forged or transposed mark, &c. or having possession of forged mark, &c. or secretly using any mark, &c. to be guilty of felony without clergy.

“pression of any such plate, stamp, or die, upon any paper whatsoever, or shall stamp or mark, or cause or procure to be stamped or marked any paper whatsoever, with any such forged or counterfeited plate, stamp, or die, as aforesaid, with intent to defraud his majesty, his heirs, &c. of any of the duties hereby granted on almanacks, newspapers, and licences to keep stage-coaches, or any part thereof; or if any person shall utter, or sell, or expose to sale any paper, having thereupon the impression of any such forged or counterfeited plate, stamp, or die, or part of any plate, stamp, or die, or any such forged, counterfeited, or resembled impression, or part of impression as aforesaid, knowing the same respectively to be forged, counterfeited, or resembled; or if any person shall privately and secretly use any plate, stamp, or die, which shall have been so provided, made or used as aforesaid, with intent to defraud his majesty, his heirs, &c. then every person so offending, and every person knowingly and wilfully aiding, abetting, or assisting any person or persons in committing any such offence as aforesaid,” shall be adjudged guilty of felony without benefit of clergy.

The seventh section further enacts, “that if any person shall forge or counterfeit, or cause or procure to be forged or counterfeited any mark, stamp, or die, which shall have been provided, made, or used in pursuance of this or any former act, relating to any duties on gold or silver plate made or wrought in Great Britain, for the purpose of marking or stamping any such gold or silver plate, in the manner directed by any such act, or shall forge, counterfeit, or resemble, or cause or procure to be forged, counterfeited, or resembled, the impression of any such mark, stamp, or die, upon any such gold or silver plate, with intent to defraud his Majesty, his heirs, &c. or if any person shall mark or stamp, or cause or procure to be marked or stamped, any such gold or silver plate, or any vessel or ware of base metal, with any such forged or counterfeited mark, stamp, or die as aforesaid, or shall transpose or remove, or cause or procure to be transposed or removed, from one piece of gold or silver plate to another, or to any vessel or ware of base metal, any impression made with any mark, stamp, or die, which shall have been provided, made, or used in pursuance of this or any former act, for the purpose of marking or stamping of any such gold or silver plate as aforesaid; or if any person shall sell, exchange, or expose to sale, or export out of Great Britain, any such gold or silver plate, or any vessel or ware of base metal, having thereupon the impression of any such forged or counterfeited mark, stamp, or die as aforesaid, or any forged, counterfeited or resembled impression of any mark, stamp, or die, so provided, made, or used as aforesaid, or any impression of any such mark, stamp, or die, which shall have been transposed or removed from any other piece of plate as aforesaid, knowing the same respectively to be forged or counterfeited, or transposed or removed as aforesaid; or if any person shall wilfully, and without lawful excuse (the proof whereof shall lie on the person accused) have or be possessed of any such forged or counterfeited mark, stamp, or die as aforesaid, or shall privately and

“ secretly use any mark, stamp, or die, so provided made or used
“ as aforesaid, with intent to defraud his Majesty, &c.” every per-
son so offending, and every person knowingly and wilfully aiding,
abetting, or assisting any person or persons committing any such
offence as aforesaid, shall be adjudged guilty of felony without
benefit of clergy. (b)

The late *Irish* stamp act, 56 Geo. 3. c. 56. s. 37. enacts, “ that if
“ any person in any part of the United Kingdom of Great Britain
“ and Ireland, or of any of the dominions thereto belonging, shall
“ counterfeit or forge, or cause or procure to be counterfeited or
“ forged, any type, die, mark, or stamp, to resemble or represent,
“ or be mistaken for any type, die, mark, or stamp at any time
“ heretofore kept or used, or hereafter to be kept or used at the
“ stamp office in *Dublin*, for denoting the charging or marking on
“ vellum, parchment, or paper, or other matter directed to be
“ stamped, any of the stamp duties payable under or by virtue of
“ any act or acts which has been or shall be at any time in force
“ in *Ireland*, although such act or acts may not be in force, or
“ such type, die, mark, or stamp may not be kept or used at the
“ said stamp office at the time of such forging or counterfeiting ;
“ or if any person or persons (save and except such person or
“ persons as shall be lawfully entitled and authorised to have and
“ to use the same for the purpose of stamping vellum, parchment,
“ or paper, or other matter directed to be stamped by or under
“ the authority of the said commissioners of stamps for the time
“ being,) shall have in his, her, or their possession, any type, die,
“ or mark or stamp made to resemble or represent, or be mistaken
“ for any type, die, mark, or stamp, heretofore kept or used, or
“ hereafter to be kept or used at the said stamp office, for denoting
“ the charging or marking on vellum, parchment, or paper, or other
“ matter directed to be stamped, any of the said stamp duties so
“ payable as aforesaid, although such type, die, mark, or stamp,
“ shall not be then kept or used at the said stamp office, or the duty
“ denoted thereby shall not be then payable in *Ireland*; or if any
“ person or persons shall mark or impress, or cause or procure to
“ be marked or impressed on any vellum, parchment, or paper, or
“ other matter which heretofore was or hereafter shall be directed
“ to be stamped, any device, mark or impression to resemble or
“ represent, or be mistaken for any device, mark or impression
“ which has been or shall be used, kept or made, marked or im-
“ pressed at the stamp-office in *Dublin*, for denoting the charg-
“ ing or marking on vellum, parchment or paper, or other matter
“ or thing so directed to be stamped, any of the said stamp duties
“ so payable under or by virtue of any act of parliament which
“ shall be or shall have been in force in *Ireland* at or before the
“ time when such mark, device or impression shall have been so
“ used, kept or made, marked or impressed, at the said office, al-
“ though such act or acts may not be in force, or such device,
“ mark or impression, may not be used or kept, marked or im-
“ pressed at the said office, at the time of such offence com-

56 Geo. 3. c.
56. s. 37.
(*Irish* act.)
Forging any
type, die, &c.
of the stamp
office in *Dub-*
lin, or having
possession of
counterfeit
types, dies, &c.
or marking
any paper, &c.
with any coun-
terfeit device,
mark, &c. or
using, utter-
ing, or having
in possession
with intent to
use any paper,
&c. with coun-
terfeit device,
mark, &c. and
also the frau-
dulent using of
any stamps,
marks, &c. by
any officer of
the commis-
sioners of
stamps, or the
having posses-
sion of any
paper, &c.
fraudulently
stamped, made
felony, pun-
ishable by
transportation
for life.

(a) See 5 Geo. 4. c. 52. (local and personal) s. 22. as to plate wrought or made within the town of *Birmingham*, and within thirty miles thereof.

“mitted; or if any person or persons shall use, utter, vend or
 “sell, or cause to be used, uttered, vended or sold, or shall have in
 “his or her possession with intent to use, utter, vend or sell the
 “same, any vellum, parchment or paper, or other matter, with
 “any counterfeit device, mark or impression thereon, to resemble
 “or represent, or be mistaken for any device, mark or impression
 “which has been or shall be used, kept or made at the stamp-
 “office aforesaid for the purposes aforesaid, or any of them, al-
 “though not then used or kept for the said purposes, or any of
 “them, or although the duty denoted thereby shall not be then
 “payable in *Ireland*, knowing such device, mark or impression to
 “be counterfeited, or if any officer or officers in the employment
 “of the commissioners of stamps, or any other person or persons
 “whatever, shall, with intent to defraud his Majesty, his heirs,
 “&c. mark or impress, or cause or procure to be marked or im-
 “pressed, or be aiding, abetting, or assisting in marking or im-
 “pressing, or in causing or procuring to be marked or impressed
 “any stamp, mark or impression, denoting any of the said stamp
 “duties on any vellum, parchment or paper, or other matter di-
 “rected to be stamped, not delivered to him or them by or by the
 “authority of the said commissioners of stamps for the purpose
 “of being stamped with any type, die, mark or stamp, which has
 “been or shall be used, kept or made at the stamp office afore-
 “said, for denoting the charging or marking on vellum, parch-
 “ment or paper, any of the said stamp duties so payable under or
 “by virtue of any act of parliament, although such type, die,
 “mark or stamp shall not be then kept at the said stamp office,
 “or the duty denoted thereby shall not be then payable in *Ire-*
 “*land*; or if any person or persons shall, with intent to defraud
 “his Majesty, his heirs, &c. knowingly have in his, her or their
 “possession any vellum, parchment or paper, or other matter re-
 “quired to be stamped, so fraudulently stamped or marked with
 “any mark or stamp to denote any of the aforesaid duties,” then
 and in every of the said cases, every such person so offending
 shall be adjudged a felon, and shall be transported for life.

56 Geo. 3. c.
 56. s. 38. As
 to the posses-
 sion by per-
 sons licensed
 to deal in
 stamps in *Ire-*
land, of vel-
 lum, paper,
 &c. with coun-
 terfeit devices,
 marks, &c.

The thirty-eighth section enacts that, whenever any vellum, parchment, or paper, shall be found in the possession of any person licensed to deal in and retail stamps in *Ireland*, or who shall have been so licensed within six calendar months then next pre-
 ceding, having impressed thereon any counterfeit device, mark or impression to resemble or liable to be mistaken for any device, &c. used kept or made at the said stamp-office, although such device, &c. shall not then be so used or kept; or although the duty denoted thereby shall not be then payable in *Ireland*; in every such case the person in whose possession such vellum, &c. shall be so found, shall be deemed to have had the same in possession with intent to use, utter or vend the same with such counterfeit device, &c. thereon, unless the contrary shall be satisfactorily proved; and shall also be deemed to have had such vellum, &c. in possession, knowing the stamps, devices, &c. thereon to be forged and counterfeited, and be liable to all punishments, &c. inflicted upon persons using, uttering or vending false, forged or counterfeit stamps, or having such false, forged or counterfeit stamps in

their possession, knowing the same to be forged, unless such person shall in all cases satisfactorily prove that such vellum, &c. and the stamps thereon, were procured at the stamp-office in *Dublin*, or from some distributor of stamps in *Ireland*.

The fifty-second section of this statute enacts, that "if any person not being an officer, workman, servant, or agent for the time being of the said commissioners of stamps, and authorised and appointed by them for that purpose and for their use only, shall make or use, or cause or procure to be made or used, or knowingly aid or assist in making or using, or, without being authorised and appointed as aforesaid, shall knowingly have in his, her, or their custody or possession, without lawful excuse (the proof whereof shall be on the person accused) any frame, mould, or instrument for the making of paper in the substance whereof the words 'stamp-office,' or the greater part of such words would be visible, or in the substance whereof any device or distinction would be visible, peculiar to and appearing in the substance of the paper which shall from time to time be used by the commissioners of stamps as aforesaid; or shall make, or cause or procure to be made, or knowingly aid or assist in making any paper in the substance whereof there shall be visible the said words 'stamp-office,' or the greater part of such words, or any such device or distinction peculiar to and appearing in the substance of the paper which shall be so used by the said commissioners of stamps; or if any person, not being authorised or appointed as aforesaid, shall knowingly have in his or her custody or possession, without lawful excuse, (the proof whereof shall be on the person accused) any paper whatsoever in the substance whereof there shall be visible the words 'stamp-office,' or the greater part of such words, or any device or distinction peculiar to and appearing in the substance of paper so from time to time used by the said commissioners; or if any person not being authorised or appointed as aforesaid, shall by any art, device, mystery, or contrivance, cause or procure, or knowingly aid or assist in causing or procuring to appear in the substance of any paper whatsoever the words 'stamp-office,' or the greater part of such words, or any such device or distinction peculiar to and appearing in the substance of the paper which shall be so used by the said commissioners of stamps;" every person so offending in any of the said cases shall be adjudged a felon, and shall be transported for the term of his or her life.

By the fifty-eighth section, a pecuniary penalty of forty pounds is imposed upon any person who, for the purpose of evading any of the stamp duties payable in *Ireland*, shall execute any stamped instrument without a date, or bearing date prior to the execution, or shall fraudulently erase, &c. the name of any person or any date, &c. engrossed or written in such instrument, or shall fraudulently cut, tear, or take off any mark or stamp from any piece of vellum, &c. with intent to use them for any other writing, &c. in respect whereof any stamp duty shall then be payable.

The statute 56 Geo. 3. c. 78. entitled "An act for the better regulating and securing the collection of the duties on paper in *Ireland*, and to prevent frauds therein," imposes large pecu-

56 Geo. 3. c. 56. s. 52. (*Irish*). Making, &c. or having possession of without excuse any frame, &c. for paper with the words, "stamp office," or so making, &c. or having possession of any paper with those words, or with any device, &c. peculiar to the paper used by the commissioners of stamps.

56 Geo. 3. c. 56. s. 58. imposes a penalty of 40*l*. for several frauds in evasion of the stamp duties in *Ireland*.

56 Geo. 3. c. 78. imposes penalties on persons forg-

ing stamps,
&c. on paste-
board, paper,
&c.

Forging, &c.
the *assay*
marks or
stamps on gold
and silver ma-
nufactures.

niary penalties on persons forging stamps, &c. on any pasteboard, paper, &c. or having in possession or using such forged stamps; and, generally, upon persons counterfeiting any stamps, &c. provided in pursuance of that act, having them in possession knowing them to be counterfeited, selling any paper with counterfeited stamps, &c. thereon, or committing other offences of a like nature. (e)

Besides the statutes which relate to the forging, &c. the stamps and marks on *plate*, by which the *duty* payable to the crown is denoted, there are others which relate to the offences of forging, &c. the *assay* marks or stamps required to be affixed to gold and silver manufactures in order to denote their standard value. Offences of this kind were first made punishable by the 12 Geo. 2. c. 26. s. 8. by pecuniary forfeiture, and imprisonment in default of payment. But that provision was repealed by the statute 31 Geo. 2. c. 32. s. 14, which statute, by s. 15. made the forging or counterfeiting the stamp, &c. used for making plate in pursuance of the 12 Geo. 2. c. 26. s. 8. by the Goldsmiths' Company, &c. the marking plate, &c. with a forged or counterfeited stamp, the transposing the stamp, &c. impressed from one vessel to another, the selling or exporting plate with a forged, counterfeit or transposed mark, and the having such stamp, &c. in possession, felony without benefit of clergy. This section of the 31 Geo. 2. c. 32. after having been amended by the 32 Geo. 2. c. 24. was repealed by 13 Geo. 3. c. 59. s. 1. And the second section of the latter statute made similar offences felony, punishable by transportation for fourteen years.

13 Geo. 3. c.
59. s. 2. For-
ging, &c. any
mark or stamp
used for gold
or silver plate
by the Gold-
smiths' Com-
pany, or by
the assayer or
workers of
plate, or forg-
ing, &c. in
imitation of
such mark,
stamp, &c. or
marking, &c.
any wrought
plate or base
metal with a
forged mark
or stamp, or
transposing
any marks,
&c.; or selling
or exporting
plate or base
metal with
forged or
transposed
marks, &c.;
or being pos-

This section of the 13 Geo. 3. c. 59. enacts, "That if any per-
"son whatsoever shall cast, forge or counterfeit, or cause or pro-
"cure to be cast, forged or counterfeited, any mark or stamp
"used, or to be used, for the marking or stamping gold or silver
"plate, in pursuance of any act or acts of parliament now in
"force by the Company of Goldsmiths in London, or by the
"wardens, or assayer or assayers, at York, Exeter, Bristol, Ches-
"ter, Norwich or Newcastle-upon-Tyne, or by any maker or
"worker of gold or silver plate, or any or either of them; or shall
"cast, forge or counterfeit, or cause or procure to be cast, forged
"or counterfeited, any mark, stamp or impression, in imitation
"of or to resemble any mark, stamp or impression made, or to be
"made, with any mark or stamp used, or to be used, as aforesaid,
"by the said Company of Goldsmiths in London, or by the said
"wardens, or assayer or assayers, or by any maker or workers of
"gold or silver plate, or any or either of them; or shall mark or
"stamp, or cause or procure to be marked or stamped, any
"wrought plate of gold or silver, or any wares of brass or other
"base metal silvered or gilt over, and resembling plate of gold or
"silver, with any mark or stamp which hath been or shall be
"forged or counterfeited at any time, in imitation of, or to re-
"semble any mark or stamp used, or to be used, as aforesaid, by
"the said Company of Goldsmiths in London, or by the said
"wardens, or assayer or assayers, or by any maker or worker of

“gold or silver plate, or any or either of them; or shall transpose or remove, or cause or procure to be transposed or removed, from one piece of wrought plate to another, or to any vessel of such base metal as aforesaid, any mark, stamp or impression, made or to be made, by or with any mark or stamp used, or to be used, as aforesaid, by the said Company of Goldsmiths in London, or by the said wardens, or assayer or assayers, or by any maker or worker of gold or silver plate, or any or either of them; or shall sell, exchange or expose to sale, or export out of this kingdom, any wrought plate of gold or silver, or any vessel of such base metal as aforesaid, with any such forged or counterfeit mark, stamp or impression thereon, or any mark, stamp or impression which hath been, or shall be transposed or removed from any other piece of plate, at any time, knowing such mark, stamp or impression, to be forged or counterfeited, or transposed or removed as aforesaid; or shall wilfully or knowingly have or be possessed of any mark or stamp which hath been, or shall be forged or counterfeited at any time in imitation of, or to resemble any mark or stamp used or to be used, as aforesaid, by the said Company of Goldsmiths in London, or by the said wardens, or assayer or assayers, or by any maker or worker of gold or silver plate, or any or either of them; every person offending in any, each or either of the cases aforesaid, and being thereof lawfully convicted, shall, by order of the Court before whom such offender shall be convicted, be transported to some of his Majesty's colonies or plantations in America, for the term of fourteen years.”

assessed, knowingly, of forged marks, &c.; made punishable by transportation for 14 years.

The statute 24 Geo. 3. sess. 2. c. 53., which required the mark of the king's head to be added both to gold and silver manufactures to denote the payment of the *duty* thereby imposed, contains similar provisions, not only with respect to such duty mark, but with respect to the assay marks, and applies to such marks when used by the company of goldsmiths in *Edinburgh*, and by the *Birmingham* and *Sheffield* company, as well as by the company of goldsmiths in *London*, and by the wardens or assayers at *York*, *Exeter*, *Bristol*, &c.: and it makes the offenders guilty of felony without benefit of clergy. (*f*) After this came the 38 Geo. 3. c. 69. (which allowed *gold wares* to be manufactured at a lower standard than before) and contains provisions nearly in a similar form to those of the 13 Geo. 3. c. 59. s. 2. as to the forging, &c. any mark or stamp used, “*in pursuance of this act*,” for the marking or stamping *gold plate* by the company of goldsmiths in *London* or *Edinburgh*, or the *Birmingham* or *Sheffield* company, or by the wardens or assayers at *York*, *Exeter*, *Bristol*, &c.; but it does not extend to marks, &c. used by any *maker* or *worker* of gold plate; and the description of articles, the marking or stamping of which with a forged or counterfeited mark or stamp is made one of the offences therein enumerated, is, “any wrought plate of gold, or any wares of silver, brass, or other metal, gilt over, and

24 Geo. 3. sess. 2. c. 53. and 38 Geo. 3. c. 69. containing provisions nearly in a similar form to the 13 Geo. 3. c. 59.

(*f*) S. 16. And it refers to the 1st December, 1784, instead of the 5th July, 1758.

"resembling plate of gold." And the offences therein enumerated are not made capital, but felonies punishable by transportation for seven years. (g) It is observed as singular that when the subject was under the review of the legislature, and the punishment for the offences under this act limited to transportation, offenders *ejusdem generis* under a former act (24 Geo. 3. sess. 2. c. 53. s. 16.) should be left subjected to capital punishment. (h)

Cutting, getting off, &c. stamps from paper, with intent to use them.

12 Geo. 3. c. 48. Any person writing any writ, mandate, &c. on paper, &c. whereon there shall have been before written any other writ, &c. liable to duty, before such paper, &c. shall have been again stamped; or fraudulently erasing names, sums, &c. or getting off any stamp from any paper, &c. with intent to use it, is guilty of felony, and may be transported for seven years.

And an offender escaping or returning from transportation, is to suffer as a felon without benefit of clergy.

As to stamps on paper, &c. in respect whereof any duty of excise is imposed.

We have seen that the late stamp act 55 Geo. 3. c. 184. s. 7. makes the fraudulent cutting or getting off any stamp from any paper, &c. with intent to use the same upon any other paper, &c. chargeable with the duties thereby granted a capital offence. (i) A former statute, 12 Geo. 3. c. 48. contains more general provisions; but makes the offences therein mentioned felony, punishable only by transportation. It enacts, "that if any person or persons shall write or engross, or cause to be written or engrossed, either the whole or any part of any writ, mandate, bond, affidavit, or other writing, matter or thing whatsoever, in respect whereof any duty is or shall be payable by any act or acts made, or to be made in that behalf, on the whole or any part of any piece of vellum, parchment, or paper, whereon there shall have been before written any other writ, bond, mandate, affidavit, or other matter or thing, in respect whereof any duty was or shall be payable as aforesaid, before such vellum, parchment, or paper, shall have been again marked or stamped according to the said acts; or shall fraudulently erase or scrape out, or cause to be erased or scraped out, the name or names of any person or persons, or any sum, date, or other thing written in such writ, mandate, affidavit, bond, or other writing, matter or thing, as aforesaid, or fraudulently cut, tear, or get off any mark or stamp, in respect whereof or whereby any duties are or shall be payable, or denoted to be paid or payable as aforesaid, from any piece of vellum, parchment, paper, playing cards, outside paper of any parcel or pack of playing cards, or any part thereof, with intent to use such stamp or mark for any other writing, matter or thing, in respect whereof any such duty is or shall be payable, or denoted to be paid or payable as aforesaid," every person so offending, and every person aiding, abetting, &c. to commit any such offence shall be deemed to be guilty of felony, and be transported to some of his Majesty's plantations beyond the seas for a term not exceeding seven years. And it further enacts that if any such person so convicted or transported shall voluntarily escape or break prison, or return from transportation before the expiration of the time, such person being thereof lawfully convicted, shall suffer death as a felon, without benefit of clergy, and shall be tried for such felony in the county where he shall be apprehended.

The statutes 47 Geo. 3. sess. 2. c. 80. s. 13. and 49 Geo. 3. c. 81. s. 1. by which the counterfeiting stamps, &c. upon paper, &c. upon which any excise duty was imposed, were repealed by 1 Geo. 4. c. 58. s. 12. and by this latter statute (s. 13.) the counter-

(g) 38 Geo. 3. c. 69. s. 7.

(h) 2 East. P. C. c. 19. s. 18. p. 892.

(i) *Ante*, 412.

feiting such stamps, &c. having counterfeit stamps, or paper with such counterfeit stamps, &c. in possession, knowing, &c. with other offences of a similar kind, are subjected to severe pecuniary penalties.

The statute 6 Geo. 4. c. 119. allows newspapers to be printed on paper of a larger size than was before permitted, and lays a duty upon supplements to newspapers, &c.; and, after extending the provisions of former acts relating to newspapers to that act, enacts "that if any person shall forge or counterfeit, or cause or procure to be forged or counterfeited, any plate, stamp or die, or any part of any plate, stamp or die, which shall have been or shall be provided, made or used in pursuance of this act, for expressing and denoting any of the duties granted by this act; or shall forge or counterfeit, or cause or procure to be forged or counterfeited, the impression, or any part or resemblance of the impression, of any such plate, stamp or die, upon any paper whatsoever; or shall stamp or mark, or cause or procure to be stamped or marked, any paper whatsoever, with any such forged or counterfeited plate, stamp or die as aforesaid, with intent to defraud his majesty, his heirs, or successors, of any of the duties by this act granted, or any part thereof; or if any person shall utter or sell, or expose to sale, any paper having thereupon the impression of any such forged or counterfeited plate, stamp or die, or part of any plate, stamp or die, or any such forged or counterfeited impression, or part or resemblance of impression as aforesaid, knowing the same respectively to be forged, counterfeited or resembled; or if any person shall privately and secretly use any plate, stamp or die which shall have been so provided, made or used as aforesaid, with intent to defraud his majesty, his heirs and successors; then every person so offending, and every person knowingly and wilfully aiding, abetting or assisting any person or persons in committing any such offence as aforesaid, and being thereof lawfully convicted, shall be adjudged guilty of felony, and shall suffer death as a felon, without benefit of clergy."

The statute 10 Ann. c. 19. s. 97. directed the commissioners of the customs to provide certain seals or stamps for imported linens; and the commissioners for managing the duties on silks, calicoes, linens, and stuffs, to provide proper seals or stamps of another kind for marking such silks, &c.; and it enacted that if any person should counterfeit or forge any stamp or seal provided or made *in pursuance of that act*, or counterfeit the impression of the same upon any of the commodities *chargeable by that act*, thereby to defraud the crown of the duties thereby granted, the offender should be guilty of felony without benefit of clergy: and further that if any person should, during the continuance of the act, sell any printed, painted, stained, or dyed silks, calicoes, linens, or other stuffs, with a counterfeit stamp, knowing the same to be counterfeited, with intent to defraud the crown, such offender should forfeit 100*l.* and stand in the pillory for two hours.

The statute 13 Geo. 3. c. 56. s. 5. reciting the 10 Ann. c. 19. 12 Ann. stat. 2. c. 9. 3 Geo. 1. c. 7. s. 1., and 6 Geo. 1. c. 4. s. 1. and reciting that doubts had arisen whether persons counterfeiting

6 Geo. 4. c. 119. as to stamps on newspapers.

Forging, &c. stamps.

Stamping papers with forged stamps.

Uttering papers with forged stamps, &c. subjected to capital punishment.

10 Ann. c. 19. s. 97. As to the forging of seals or stamps for linens, calicoes, &c.

13 G. 3. c. 56 s. 5. recites certain doubts upon former statutes:

And enacts that any person forging any stamp, &c. provided by the commissioners, shall be guilty of felony without clergy.

or forging any stamp or seal to resemble any stamp or seal renewed or altered by the commissioners of excise, in pursuance of the authority of the said act of the twelfth year of Queen Anne, or counterfeiting or resembling the impression of such renewed or altered stamp or seal, are subject to the penalties and pains of death in the said acts enacted and declared; and evil-minded persons had thereby been encouraged to counterfeit such renewed and altered stamps and seals; for obviating all such doubts, enacts, "that if any person or persons whatsoever shall, "at any time or times hereafter, counterfeit or forge any stamp or seal, already provided by the said commissioners, or which "shall hereafter be by them provided, renewed, or altered, or "shall counterfeit or resemble the impression of the same, upon "any of the said commodities chargeable by the said acts, thereby "to defraud his majesty, his heirs, or successors, of any of the "said duties thereby granted;" then every such person so offending shall be adjudged a felon, and shall suffer death, as in cases of felony, without benefit of clergy. (*k*)

Subsequent statutes relating to the duties of the customs and excise have contained similar provisions, either by re-enactment as in 27 Geo. 3. c. 31. s. 13, 14, or by express reference as in 43 Geo. 3. c. 69. s. 4.

Construction of the stamp acts.

Field's case. Question upon the words *intent to use* in the statute 12 Geo. 3. c. 48.

The books afford but few cases on the construction of the stamp acts.

A question was made upon that part of the 12th Geo. 3. c. 48. which relates to the offence of fraudulently getting off a stamp from parchment or paper *with intent to use* the same for any other writing, &c. (*l*) whether a person taking a stamp from a writ, fixing it to another writ of the same kind, and then selling it to a law stationer to be disposed of in his business, and used by any person who might purchase it of him, was a sufficient using of it within the words of the statute. It was contended on behalf of the prisoner that as the statute was silent as to uttering, vending, or exposing to sale, it would violate the known rules of construction, to say, in so penal a case, that the sale to the law stationer was made *with an intent to use* the stamp in the manner described by the act. No opinion of the Judges upon this point appears to have been delivered; but the prisoner, after lying a long time in gaol, was ultimately discharged. (*m*)

Palmer's case. Construction of the words "any paper liable to the said duties" in the statute 23 Geo. 3. c. 49. s. 20.

The following case arose upon the statute 23 Geo. 3. c. 49. s. 20. by which it was enacted that if any person should forge, &c. any stamp or mark directed or allowed to be used by the act for the purpose of denoting the duties therein mentioned, or should fraudulently use any of the said stamps or marks, or should "utter, "vend, sell, or expose to sale *any paper liable to the said duties*, "with any counterfeit mark or impression thereon," knowing the same to be counterfeited, such person should be guilty of felony without benefit of clergy. The indictment against the prisoner contained two counts. The first, after stating that a certain stamp

(*k*) But as to the capital punishment, *qu.* and see 52 Geo. 3. c. 143. s. 1. *Ante*, 410.

(*l*) *Ante*, 420.

(*m*) Field's case, O. B. 1785. 1 Leach 383.

was provided by the statute for stamping every piece of paper upon which any receipt, &c. upon the payment of money amounting to 2*l.* &c. was written with a stamp duty of 2*d.* &c. stated, that the prisoner, intending to defraud the king of the duty on, &c. "unlawfully, fraudulently, and feloniously did utter and expose for sale to one Hannah Gabriel, 1,000 pieces of paper *liable to the said duty of twopence*, with a counterfeit impression upon each and every one of the said pieces of paper resembling the impression of the said stamp then and there used, according to the form of the statute, &c. he the defendant at the said time of uttering, &c. well knowing the said impression on the said pieces of paper so by him uttered, &c. to be counterfeited; against the form of the statute, &c." The second count was the same as the first, except in this respect that the words "*liable to the said duty of twopence*" were omitted. An objection was taken on behalf of the prisoner, on the ground that the words "*papers liable to the said duties*" were entirely void of the precise sense and definition to which they were applied; and also that the indictment had not sufficiently stated the offence according to the words of the statute. The prisoner having been found guilty, the question was reserved for the consideration of the Judges; ten of whom (Lord C. B. Skynner and Hotham B. being absent from indisposition) were unanimous that the conviction was right; and their opinion was afterwards delivered by Gould, J., to the following effect. The objection arises upon a supposed inaccuracy of the words in the statute, "*paper liable to the said duties*," in the plural number; which words the present indictment has properly pursued and necessarily applied to the particular duty in question, *viz.* the duty of twopence on receipts; and the Judges are of opinion that the indictment is properly drawn, although a duty of one description only is mentioned. The material question is, what the legislature meant by the words "*paper liable to the duties*?" And it was said that as one particular piece of paper cannot be liable to any of the duties more than another, it would follow that all the writing paper in the world might be considered as "*paper liable to duties*," and every utterer or seller of paper of any description, might be indicted for a capital offence, in having exposed to sale "*paper liable to the said duties*." But the Judges are of opinion that, upon a due attention to the present statute, and the subsequent statute 24 Geo. 3. c. 7. upon the same subject, it will appear that the words "*paper liable to the said duties*" are capable of a clear and unequivocal meaning. The rules by which the expressions of the legislature are to be interpreted are; first, that if any part of a statute is penned obscurely, and other passages in the same statute will elucidate that obscurity, recourse ought to be had to such context for that purpose; and, secondly, that if there are several statutes upon the same subject, they are to be taken together as forming one system, and as interpreting and enforcing each other. By adopting these rules in the present case it will appear that the words "*paper liable to the said duties*," are not to be taken in the large and absurd sense which was attempted to be imposed upon them, namely, as applying to every species of paper on which receipts might possibly be written, but are to be

2

taken as applying distinctly to such pieces of paper only as are destined or prepared for the uses mentioned in the statute. The paper which is destined and prepared for the use of writing receipts thereon is the paper meant by the words "paper liable to the duties;" and therefore all paper upon the face of which a mark appears resembling the mark which the act requires, is evidently "paper liable to the duties," because the preparation of thus marking it discovers the purpose for which it is designed. Upon the papers mentioned in the indictment, there appears a false stamp or impression resembling the true stamp which the law requires for receipts: this discovers the use for which they were destined and prepared, and brings them within the general words of the act, "paper liable to the said duties." The Judges are, therefore, unanimously of opinion that the prisoner was properly convicted; and that the words "paper liable to the said duties" are to be applied, according to the subject matter, to such paper, which, from the counterfeit mark upon it, appears to be prepared to be used, as if the mark were genuine, for a receipt. (n)

It appears also that some of the Judges were of opinion, that the second count which omits the words "liable to the said duties," was sufficient; for it was a charge of fraudulently uttering, &c. paper with a counterfeit impression, resembling the said stamps used in pursuance of the said statute, knowing, &c.; and this in substance was a charge of its being paper denoted by the said impression to be destined for writing receipts, and, as such, being paper liable to that duty. (o)

A question was made in the following case, as to a distinction between the words "duties of excise," and "duties under the management of the commissioners of excise." The prisoners were indicted for forging a stamp on foreign muslins, printed, &c. here with intent to defraud the King of the duty; and one of them having been convicted, an objection was taken by his counsel on these grounds. That the offence was originally created by 25 Geo. 3. c. 72. s. 17. by which the duties for securing of which the stamps were provided, were imposed. That by 27 Geo. 3. c. 13. s. 35. all the former duties are repealed, except duties due, and penalties and forfeitures incurred at the time of passing that act; and therefore it was argued that all penalties were annihilated unless re-enacted. That this, as well as all preceding statutes, took a distinction between *duties of excise*, and *duties under the management of the commissioners of excise*; according to what was observed by Mr. Justice Ashhurst, in *Rex v. The Justices of Surrey*, 2 Term. Rep. 504. That section 38 of the latter statute states that "all pains, penalties, fines and forfeitures of any nature or kind whatsoever, as well pains of death as others, for any offence in force before the tenth of May, 1787, made for securing the revenue of excise, or other duties under the management of the commissioners of excise, &c. shall extend to and be applied for, and in respect of the several *duties of excise*, and allowances, bounties, and drawbacks

Hall and
Crutchfield's
case.

The words
"duties of ex-
cise," and
"duties under
the manage-
ment of the
commis-
sioners of
excise,"
held to be sy-
nonymous.

(n) Palmer's case, O. B. 1784, Hil. c. 19. s. 19. p. 893.

T. 1785. 1 Leach 352. 2 East. P. C.

(o) 2 East. P. C. c. 19. s. 19. p. 895.

"of duties of excise thereby charged and allowed, &c." That, therefore, those penalties and pains of death, being re-enacted only so far as they relate to *duties of excise*, and not to duties or sums *under the management of commissioners of excise*, (which was the case with respect to the duty in question) they could not be revived by construction: but being so highly penal, must be specially re-enacted. Another objection was also taken, that the indictment did not pursue the words of the statute; inasmuch as it stated, the duty to be chargeable *for, on, and in respect of* foreign muslin, &c. whereas the words of the statutes imposing the duty were "for and upon" in some of the clauses, "on" in others, "upon" in others, and "for" in the schedule; but this objection was afterwards thought not worth urging. Upon the principal objection, ten of the Judges, (all who were present at the conference) held that the conviction was right. Eyre, C. J., thought that the naming of *duties of excise* and *duties under the management of the commissioners of excise* was tautology. But all held it clear, that the expressions were used as synonymous in this act; adverting to schedule F., in which the duties on muslins are denominated "*duties of excise*." (p)

On an indictment on the statutes 12 Geo. 3. c. 26. s. 8., 31 Geo. 2. c. 32. s. 14., and 24 Geo. 3. c. 53. s. 16. for removing from one silver knee buckle to another silver knee buckle certain stamps, marks, and impressions; to wit, the king's head, and the lion rampant, with intent to defraud the King, against the statute, &c. on producing the silver knee buckle in evidence, it appeared that the mark was a lion passant, instead of a lion rampant; and the Court held the variance fatal. (q)

Lee's case.
Variance between a *lion passant* and a *lion rampant*.

In a modern case it was holden, that the engraving a counterfeit stamp similar in some parts, though dissimilar in others, to the legal stamp, cutting out the dissimilar parts, concealing the space from whence the dissimilar parts were cut out, and then uttering the similar parts as a genuine stamp, amounted to a forgery and guilty uttering. And it was also holden in the same case, that it is not necessary in an indictment for forging a stamp, to set out the impression or inscription upon it, or to name the amount of the duty thereby denoted: but that it is sufficient to describe it as a stamp provided and used in pursuance of a certain act of parliament. The indictment was framed on the statute 44 Geo. 3. c. 98. for forging and uttering medicine stamps, and consisted of seven counts. The first count charged that the prisoner on the 1st of November, 1811, feloniously did forge and counterfeit, &c. *a certain mark* provided and used in pursuance of a certain act of parliament, intitled, &c. The second count charged, that he did feloniously utter *a certain paper* with a forged and counterfeit mark, which mark was forged and counterfeited to resemble a certain mark provided and used in pursuance of the said act, he well knowing the said mark to be forged. The third count was for knowingly vending and selling a certain paper with a forged

Collicott's case.
The engraving a counterfeit stamp, similar in some parts though dissimilar in others to the legal stamp, cutting out the dissimilar parts, concealing the space from whence the dissimilar parts were cut out, and then uttering the similar parts as a genuine stamp, holden to amount to a forgery, and guilty uttering.
It is sufficient in an indict-

(p) *Rex v. Hall and Crutchfield*, O. B. 1795. East. T. 1795. 2 East. 416.
(q) *Lee's case*, O. B. 1786. 1 Leach P. C. c. 19. s. 19. p. 895.

ment for forging a stamp to describe the stamp as a stamp provided and used in pursuance of a certain act of parliament.

mark, &c. The four remaining counts were the same as the former, except that they described it as a *stamp* instead of a *mark*: and all the counts laid the intention to be to defraud his Majesty of the duties charged and imposed by the said act. It appeared upon the evidence, that the prisoner was a vender of patent medicines; and sold certain boxes of Dr. Jebb's pills, with the counterfeit label on them. Many of these counterfeit labels were found in his possession entire. They were of an oblong form, coloured with red ink, similarly to the stamps for patent medicines issued by government; and having like them, at one end, the word "stamp," and at the other end, the word "office," printed transversely, and on a blank on the first mentioned end, printed longitudinally, the words "value above 1s.," and on a blank on the other end, also printed longitudinally, the words "not exceeding 2s. 6d.," as the legal stamps also have; and having in the centre a white circle, which, in the counterfeit, was all blank, except that it bore the words, "*Jones, Bristol*," printed thereon; whereas, in the legal stamp, that circular space was circumscribed with a red ring, and inscribed with another smaller red ring, and in the circular space between the two rings were printed the words, "duty three-pence;" and on the space within the inner red ring on the legal stamp was impressed in red ink the figure of a crown. When the prisoner used these stamps, he cut out the circular space bearing the words "*Jones, Bristol*," and pasted on the packets of medicine the two ends of the label without the middle part, and concealed the deficiency of that part by a waxen seal extending over it. Stamps were uttered in this state by the prisoner affixed to the pills which he sold. Upon these facts the jury found the prisoner guilty: but two objections were taken in his behalf; first, that the forged stamp was not a sufficiently near resemblance of the genuine stamp to constitute forgery; secondly, that the indictment was deficient for not setting out or describing what the stamp was that was forged. The objections were referred to the consideration of the twelve Judges; ten of whom (Lawrence, J., and Bayley, J., being absent) were of opinion that the objections were unfounded, and the conviction right. Grose, J., in delivering their opinion, said:—As to the first point, it was proved, "that this stamp had, in every respect, and in all its parts, a perfect resemblance to a genuine stamp, excepting only that the centre part in a genuine stamp, which specifies and denotes the duty, was in the forged stamp cut out; and a paper with the words '*Jones, Bristol*,' on it, pasted over the vacancy. It was also proved, that those parts which still remained were a perfect resemblance of the same parts on the genuine stamp, and that the whole was a fabrication so artfully contrived as to be likely to deceive the eye of every common observer. An exact resemblance, or *fac simile*, is not required to constitute the crime of forgery; for if there be a sufficient resemblance to shew that a false making was intended, and that the false stamp is so made as to have an aptitude to deceive, that is sufficient. In this case the jury, by their verdict, have found that this stamp had a sufficient likeness to give it an aptitude to deceive, which is all the law

“requires. As to the second point, the indictment charges the
“prisoner with having forged a certain *mark*, and with having
“uttered a certain paper with a forged and counterfeited *mark*,
“resembling a mark provided and used in pursuance of the act :
“and the other counts describe it to be *a stamp*. The statute
“makes the forging and uttering of such *a mark* or *stamp*, as is
“thereby directed to be affixed to these articles, a capital offence.
“The indictment contains all the words that the act requires to
“constitute the offence.” (r)

With respect to the trial of offences against the stamp acts, the
statute 53 Geo. 3. c. 108. s. 25. enacted, “that from and after the
“passing of this act all criminal offences committed against or in
“breach of any act or acts of parliament now in force, for grant-
“ing or securing any of the duties under the management of the
“commissioners of stamps, shall and may be inquired of, tried,
“and determined, either in the county or city, or town and
“county where the offence shall be committed, or where the
“party or parties accused, or any of them, shall be apprehended.”

Trial in the
county where
the offences
were commit-
ted, 53 Geo. 3.
c. 108. s. 25.

(r) Collicott's case, O. B. 1812, ar- 1812. 2 Leach 1048. 4 Taunt. 300.
gued before the Judges, 25 April, 2 Russ. & Ry. 212, 229.

CHAPTER THE THIRTY-EIGHTH.

OF THE FORGERY OF OFFICIAL PAPERS, SECURITIES, AND DOCUMENTS.

FORGERIES of official papers, securities, and documents have been made in many instances the subject of especial legislative enactments.

Forging the mark, &c. of the receiver of prelines at the alienation office, 32 Geo. 2. c. 14. s. 9. 52 Geo. 3. c. 143. s. 5.

By the statute 32 Geo. 2. c. 14. the *receiver of the prelines* at the alienation office was directed to receive the post fine at the same time on every writ of covenant sued out for the passing of fines in the Common Pleas, and to indorse the receipt of the same thereon, with his name and mark of office. The ninth section then enacted, that if any person should make, forge, or counterfeit, or cause or procure, &c. the mark or hand of such receiver, whereby such receiver or any other person or persons should or might be defrauded, or suffer any loss thereby, every person convicted of such offence should be deemed guilty of felony, and suffer death without benefit of clergy. (a) The more recent statute 52 Geo. 3. c. 143. s. 5. enacts, "that if any person shall "make, forge, or counterfeit, or cause or procure to be made, "forged, or counterfeited, the mark or hand of the receiver of the "prelines at the alienation office, upon any writ of covenant, "whereby such receiver or any other person shall or may be defrauded, or suffer any loss thereby; every person so offending "shall be adjudged guilty of felony, and shall suffer death as a "felon without benefit of clergy." (b)

Uttering a false certificate of a conviction for a previous felony.

The statute 7 & 8 Geo. 4. c. 28. s. 11. after reciting the expediency of providing for the more exemplary punishment of offenders who commit felony after a previous conviction for felony, and enacting such punishment, regulates the form of indictment

(a) As to the capital part of the punishment, *qu.* and see post. note (b).

(b) The first section of this statute enacts, "that in all cases where any "act to be done or committed after "the passing of this act, in breach of, "or in resistance to any part of the "laws for collecting his Majesty's "revenue in Great Britain, would by "the laws now in force subject the

"offender to suffer death, as guilty "of felony, without benefit of clergy, "by virtue of the said laws, or any of "them, such act, so to be done or "committed, shall be deemed and "taken to be felony with benefit of "clergy, and punishable only as such, "unless the same shall also be declared to be felony without benefit "of clergy, by this act."

for the subsequent felony; and then enacts, that "a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for the previous felony, purporting to be signed by the clerk of the court, or other officer having the custody of the records where the offender was first convicted, or by the deputy of such clerk or officer, (for which certificate a fee of six shillings and eight-pence, and no more, shall be demanded or taken,) shall, upon proof of the identity of the person of the offender, be sufficient evidence of the first conviction, without proof of the signature or official character of the person appearing to have signed the same; and if any such clerk, officer, or deputy shall utter a false certificate of any indictment and conviction for a previous felony, or if any person, other than such clerk, officer, or deputy, shall sign any such certificate as such clerk, officer, or deputy, or shall utter any such certificate with a false or counterfeit signature thereto, every such offender shall be guilty of felony, and, being lawfully convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years; and if a male, to be once, twice, or thrice publicly or privately whipped, (if the Court shall so think fit,) in addition to such imprisonment."

The statute 42 Geo. 3. c. 116. consolidated the former acts for the redemption and sale of the *land tax*; and it enacted, (by s. 194.), "that if any person shall forge, counterfeit, or alter, or cause or procure to be forged, counterfeited, or altered, or knowingly or wilfully act or assist in the forging, counterfeiting, or altering any contract or contracts for the redemption or sale of any *land tax*, or any assignment or assignments of any such land tax, or of any such contract or contracts, or of any portion of land tax therein comprised, or any certificate or certificates of the commissioners of land tax or of supply, or of any chief magistrate authorised by this act to make out such certificate or certificates, or of the surveyor-general of the land revenue of the crown, or of the duchy of Cornwall, or any certificate or certificates, receipt or receipts, of the cashier or cashiers of the governor and company of the Bank of England, or any certificate or certificates, or attested copy of any certificate or certificates, directed by this act to be made out by the proper officer, or shall wilfully deliver or produce to any person or persons acting under the authority of this act, or shall utter any such forged, counterfeited, or altered contract or contracts, assignment or assignments, certificate or certificates, receipt or receipts, knowing the same to be forged, counterfeited, or altered, with intent to defraud his Majesty, his heirs, &c. or any body or bodies politic or corporate, or company or other person or persons whomsoever," then and in every such case, all and every person or persons so offending shall be adjudged guilty of felony, without benefit of clergy.(c) The statute 52 Geo. 3. c. 143. s. 6. enacts "that if any person shall forge, counterfeit, or alter, or

Forgery of contracts, certificates, &c. for the redemption or sale of the *land tax*. 42 Geo. 3. c. 116. s. 194.

52 Geo. 3. c. 143. s. 6.

“ cause or procure to be forged, counterfeited, or altered, or knowingly or wilfully act or assist in the forging, counterfeiting, or altering any contract, assignment, certificate, receipt, or attested copy of any certificate made out or purporting to be made out by any person or persons authorised to make out the same by any act of parliament touching the redemption or sale of the land tax, or of any part thereof; or if any person shall wilfully utter any such forged, counterfeited, or altered contract, assignment, certificate, receipt, or attested copy of certificate, knowing the same to be forged, counterfeited, or altered, with intent to defraud his Majesty, his heirs, or successors, or any body or bodies politic or corporate, or other person or persons;” every person so offending shall be adjudged guilty of felony without benefit of clergy.

Forgery of
excise permits,
&c. 23 Geo.
3. c. 70. s. 9.
52 Geo. 3. c.
143. s. 9.

The statute 23 Geo. 3. c. 70. s. 9. made the forgery of *excise permits*, &c. a capital felony: (d) and a clause nearly similar is contained in the recent statute 52 Geo. 3. c. 143. s. 9. which enacts, that if any person not being authorised shall make, &c. or knowingly have in possession, without lawful excuse, any frame, &c. for the making of paper, with the words “excise office” visible in the substance of such paper, or shall make, &c. any paper in the substance of which the words “excise office” shall be visible; or shall cause or procure the said words “excise office” to appear visible in the substance of any paper whatever; (e) or if any person (not being lawfully appointed or authorised so to do), “shall engrave, cast, cut, or make, or shall cause or procure to be engraven, cast, cut, or made, any mark, stamp, or device, in imitation of or to resemble any mark, stamp, or device, made or used by the direction of the commissioners of excise in England or Scotland, or the major part of them respectively, for the purpose of printing, stamping, or marking of any paper to be used as for a permit or permits to accompany any exciseable commodity or commodities removing or removed from one part of Great Britain to any other part thereof in pursuance of the directions of any of the several statutes requiring such permit;” every person so offending shall be adjudged guilty of felony without benefit of clergy.

Forging, &c.
debentures or
certificates, for
the return of
money from
duties of cus-
toms or excise,
52 Geo. 3. c.
143. s. 10.

The tenth section of the statute 52 Geo. 3. c. 143. enacts, “That if any person shall, with intent to defraud his majesty, falsely make, forge, counterfeit or alter, or cause or procure to be falsely made, forged, counterfeited or altered, or willingly assist in falsely making, forging, counterfeiting or altering any *debenture*, or any *certificate* for the payment or return of any money, or any part of any such debenture or certificate, or any signature thereon, in any case in which such debenture or certificate is by any act or acts of parliament relating to the duties of customs or excise required or directed to be given or granted; or shall wilfully, with such intent as aforesaid, utter, publish or make use of any such debenture or certificate, or part thereof, so being wholly or in part falsely made, forged, counterfeited or

(d) See *ante*, note (b).

(e) See the first part of this section more at large, *ante*, 412.

“altered;” every person so offending, shall be adjudged guilty of felony, without benefit of clergy.

The statute 46 Geo. 3. c. 75. s. 8. enacts, “That if any person or persons shall knowingly and wilfully forge or counterfeit, or cause or procure to be forged or counterfeited, or knowingly and wilfully act or assist in forging or counterfeiting the name or handwriting of the *receiver-general of the excise* for the time being, or of the comptroller of the cash of the excise, or the person or persons duly authorised as aforesaid, to any draft, instrument, or writing whatsoever, for or in order to the receiving or obtaining any of the money in the hands or custody of the governor and company of the Bank of England, on account of the receiver-general of the excise, or shall forge or counterfeit, or cause or procure to be forged or counterfeited, or knowingly and wilfully act or assist in the forging or counterfeiting any draft, instrument, or writing in form of a draft, made by such receiver-general, or the person or persons authorised as aforesaid, or shall utter or publish any such, knowing the same to be forged or counterfeited, with an intention to defraud any person whomsoever;” every person so offending, shall be guilty of felony, without benefit of clergy.

Forging, &c. the name or handwriting of the receiver-general, comptroller, &c. of the excise, 46 Geo. 3. c. 75. s. 8.

By the 48 Geo. 3. c. 82. which relates to *Ireland* only, it was enacted, “That if any person whatever shall fraudulently, or without being duly authorised thereto, issue or give out, or cause to be issued or given out, or be aiding or assisting in issuing or giving out any blank *permit*, or any permit not duly authorised by a preceding request-note; or shall fill up any blank permit, not duly authorised by a preceding request-note; or if any person shall fill up or issue any permit not corresponding to or answering with the duplicate thereof in the possession of the officer; or if any person shall obtain or make use of any permit so unduly or fraudulently issued;” such person, so offending in any of the cases aforesaid, shall be adjudged a felon, and be transported for the term of life, or for seven years, or be sentenced to such other less punishment as the Court who shall try such person shall direct.

Granting, obtaining, or using, false permits in Ireland, 48 Geo. 3. c. 82. s. 4.

The statute 46 Geo. 3. c. 76. s. 9. enacts, “That if any person or persons shall knowingly and wilfully forge or counterfeit or cause or procure to be forged or counterfeited, or knowingly and wilfully act or assist in forging or counterfeiting the name or handwriting of the *receiver-general of the stamp duties* for the time being, or of his clerk, or of either of the commissioners of stamps, to any draft, instrument, or writing whatsoever, for or in order to the receiving or obtaining any of the money in the hands or custody of the governor and company of the Bank of England, on account of the receiver-general of the stamp duties, or shall forge or counterfeit, or cause or procure to be forged or counterfeited, or knowingly and wilfully act or assist in the forging or counterfeiting any draft, instrument, or writing in form of a draft, made by such receiver-general or his clerk, or shall utter or publish any such, knowing the same to be forged or counterfeited, with an intention to defraud any person whom-

Forging instruments in the name of the receiver-general of the stamp duties, &c. 46 Geo. 3. c. 76. s. 9.

Forging the name or handwriting of the receiver-general or comptroller-general of the customs; &c. 6 Geo. 4. c. 106. s. 27.

"soever;" every person so offending shall be guilty of felony, without benefit of clergy.

The statute 6 Geo. 4. c. 106. s. 27. enacts "that if any person or persons shall knowingly and wilfully forge or counterfeit, or cause or procure to be forged or counterfeited, or knowingly and wilfully act or assist in forging or counterfeiting the name or handwriting of any receiver-general of the customs, or of any comptroller-general of the customs, or of any person acting for them respectively as aforesaid, to any draft, instrument, or writing whatsoever, for or in order to the receiving or obtaining any of the money in the hands or custody of the governor and company of the Bank of England, on account of the receiver-general of the customs; or shall forge or counterfeit, or cause or procure to be forged or counterfeited, or knowingly and wilfully act or assist in the forging or counterfeiting any draft, instrument, or writing in form of a draft made by such receiver-general or person as aforesaid; or shall utter or publish any such, knowing the same to be forged or counterfeited, with an intention to defraud any person whomsoever; every such person or persons so offending, being thereof lawfully convicted, shall be and is and are hereby declared and adjudged to be guilty of felony, and shall suffer death as in case of felony, without benefit of clergy."

Forging, &c. of *exchequer bills*, 48 Geo. 3. c. 1. s. 9.

The forging or counterfeiting of *exchequer bills* has been usually made a capital felony by the several statutes passed to authorize the issuing of those securities. The 48 Geo. 3. c. 1. s. 9. enacts, "That if any person or persons shall forge or counterfeit any exchequer bill, or any indorsement or writing thereupon or therein, or tender in payment any such forged or counterfeited bill, or any exchequer bill with such counterfeit indorsement or writing thereon, or shall demand to have such counterfeit bill, or any exchequer bill with such counterfeit indorsement or writing thereupon or therein, exchanged for ready money or for another exchequer bill, by any person or persons, body or bodies politic or corporate, who shall be obliged or required to exchange the same, or by any other person or persons whatsoever, knowing the bill so tendered in payment, or demanded to be exchanged, or the indorsement or writing thereupon or therein to be forged or counterfeited, and with intent to defraud his majesty, his heirs, &c. or the persons to be appointed to pay off the same, or any of them, or to pay any interest thereupon, or the person or persons, body or bodies politic or corporate, who shall contract to circulate, or exchange the same, or any of them, or any other person or persons, body or bodies politic or corporate;" every person so offending shall be adjudged a felon, without benefit of clergy. This statute has generally been extended to subsequent acts, authorising a further issue of exchequer bills; as in the 51 Geo. 3. c. 15., the first section of which authorises the issue in the same manner, form, &c. as enacted and prescribed in the 48 Geo. 3. c. 1.: and the second section enacts, "That all and every the clauses, provisoes, powers, privileges, advantages, penalties, forfeitures and disabilities, contained in the said last-mentioned act, shall be applied and extended to the exchequer

"bills to be made in pursuance of this act, as fully and effectually to all intents and purposes, as if the said several clauses or provisions had been particularly repeated and re-enacted in the body of this act." (f)

The statutes authorising issues of exchequer bills frequently also contain a clause relating to the forging, &c. of the certificates or receipts therein mentioned. Thus by the 51 Geo. 3. c. 15. s. 71. "If any person or persons shall forge, counterfeit or alter, or cause or procure to be forged, counterfeited or altered, or knowingly or willingly act or assist in the forging, counterfeiting or altering any certificate or certificates of the said commissioners by this act appointed as aforesaid, or any of them, or any receipt or receipts to be given by the cashier or cashiers of the Bank of England, in pursuance of this act; or shall willfully deliver to the auditor of the receipt of his Majesty's exchequer for the time being, or to any officer appointed by him, or to the said commissioners by this act appointed, or any of them, or to any officer or officers appointed by them or any of them in the execution of the powers of this act, or shall utter any such forged, counterfeited or altered certificate or certificates, receipt or receipts, knowing the same to be forged, counterfeited or altered, with intent to defraud his Majesty, his heirs, &c. or any body or bodies politic or corporate, or any person whomsoever;" in every such case, every person so offending shall be adjudged guilty of felony, without benefit of clergy. A clause nearly similar is contained in the 3 Geo. 4. c. 86. s. 54.

Forging of certificates and receipts relating to exchequer bills, 51 Geo. 3. c. 15. s. 71.

The statutes also occasionally passed in order to grant annuities for the discharge of certain *exchequer bills*, make the forging of the certificates, &c. therein mentioned capital offences: as the 50 Geo. 3. c. 23. s. 11., 53 Geo. 3. c. 41. s. 26., and the late statute 58 Geo. 3. c. 23. s. 38.

Forging certificates, &c. relating to the discharge of exchequer bills.

The statute 24 Geo. 3. sess. 2. c. 37. s. 9. made the forging of *franks* a felony, punishable by transportation for seven years; and a clause precisely similar is contained in the later statute 42 Geo. 3. c. 63. s. 14. which enacts, "That if any person whatsoever shall forge or counterfeit the handwriting of any person whatsoever in the superscription of any letter or packet to be sent by the post, in order to avoid the payment of the duty of postage, or shall forge, counterfeit, or alter, or shall procure to be forged, counterfeited, or altered, the date upon the superscription of any such letter or packet, or shall write and send by the post, or cause to be written and sent by the post, any letter or packet, the superscription or cover whereof shall be forged or counterfeited, or the date upon such superscription or cover altered, in order to avoid the payment of the duty of postage, knowing the same to be forged, counterfeited, or altered;" every person so offending shall be deemed guilty of felony, and shall be transported for seven years.

Forging franks of letters, 24 Geo. 3. sess. 2. c. 37. s. 9., 42 Geo. 3. c. 63. s. 14.

(f) And see also the more recent statutes, 56 Geo. 3. c. 28., 57 Geo. 3. c. 2. c. 16. and c. 80., to which the

clauses of the 48 Geo. 3. c. 1. are extended.

43 Geo. 3. c. 28. s. 22. as to
franks in Ire-
land.

The statute 43 Geo. 3. c. 28. s. 22. (relating to the duties on letters sent by the post in *Ireland*.) enacts, that if any person shall forge or counterfeit the seal or handwriting, or make use of the name of any person, in the superscription of any letter or packet, to be sent by the post in *Ireland*, in order to avoid the payment of the duty of postage there, or shall forge, alter, &c. or procure to be forged, altered, &c. the date, place, or any other part of the superscription of any such letter or packet, or shall write, or cause to be written or sent by the post in *Ireland*, any letter or packet, the superscription, or any part whereof, shall be forged, altered, &c. in order to avoid the payment of the duty of postage there, knowing, &c.; or if any person shall forge, &c. or procure to be forged, altered, &c. any certificate of any member of either house of parliament, (as mentioned in the act,) or of any other person entitled to the privilege of sending letters free of the duty of postage, in order to have the postage charged upon any cover, letter, &c. refunded, such offender shall, for the first offence, forfeit fifty pounds; for the second offence, one hundred pounds; and for the third offence, shall be deemed guilty of felony, and be transported for seven years.

Forging post-
office marks, 54
Geo. 3. c. 169.
s. 14. 55 Geo.
3. c. 103.

The forging of the *post-office mark*, for the purpose of avoiding the payment of the postage, is punishable as a misdemeanor. The statute 54 Geo. 3. c. 169. s. 14. enacts, "That if any person shall forge or counterfeit, or cause to be forged or counterfeited any stamp, mark of postage or designation upon any letter hereby authorised to be so stamped, marked or designated, with intent to avoid the payment of the rate of postage hereby imposed," each and every person and persons so offending shall be deemed to be guilty of a misdemeanor, to be punished by fine and imprisonment, and that such offence, if committed within Great Britain, shall be enquired of, tried, &c. either within the city of London, or where the offence shall be committed. The statute 55 Geo. 3. c. 103. which was passed for the purpose of regulating the postage of ship letters to and from *Ireland*, contains a similar enactment as to letters thereby authorised to be marked, except as to the provision for the place in which the misdemeanor is to be tried.

Forging the
hand of the re-
ceiver-general
of the post-
office, his
clerk, &c. 46
Geo. 3. c. 83.
s. 9. 47 Geo.
3. sess. 2. c. 59.
s. 3.

The forging the name or handwriting of the *receiver-general of the post-office*, or his clerk, or persons duly authorised by him, to any draft, instrument, &c. has been made the subject of especial legislative enactment. The 46 Geo. 3. c. 83. s. 9. enacts, "That if any person or persons shall knowingly and wilfully forge or counterfeit, or cause or procure to be forged or counterfeited, or knowingly and wilfully act or assist in forging or counterfeiting the name or handwriting of the receiver-general of the post-office for the time being, or his clerk, to any draft, instrument, or writing whatsoever, for or in order to the receiving or obtaining any of the money in the hands or custody of the governor and company of the Bank of England, on account of the receiver-general of the post-office, or shall forge or counterfeit, or cause or procure to be forged or counterfeited, or knowingly and wilfully act or assist in the forging or counterfeiting any draft, instrument, or writing in form of a draft, made by

“such receiver-general or his deputy, or shall utter or publish
 “any such, knowing the same to be forged or counterfeited, with
 “an intention to defraud any person whomsoever, or any corpora-
 “tion;” every such person so offending shall be guilty of felony,
 without benefit of clergy. The 47 Geo. 3. sess. 2. c. 59. after re-
 citing the former act, and providing that any person duly autho-
 rised by the receiver-general, and approved of by the postmaster-
 general, may receive any monies, make any payments, sign any
 drafts, instruments, &c. enacts, (s. 3.) “That if any person or
 “persons shall knowingly and wilfully forge or counterfeit, or
 “cause or procure to be forged or counterfeited, or knowingly
 “and wilfully act or assist in forging or counterfeiting the name
 “or handwriting of any person or persons duly authorised by
 “the receiver-general of the post-office to draw any such drafts,
 “instruments, or writings as aforesaid, to any draft, instrument,
 “or writing whatsoever, for or in order to the receiving or ob-
 “taining any of the money in the hands or custody of the go-
 “vernour and company of the Bank of England, on account of the
 “receiver-general of the post-office, or shall forge or counterfeit,
 “or cause or procure to be forged or counterfeited, or knowingly
 “and wilfully act or assist in the forging or counterfeiting any
 “draft, instrument, or writing, in form of a draft, made by any
 “such person, or shall utter or publish any such, knowing the
 “same to be forged or counterfeited, with an intention to defraud
 “any person whomsoever, or any corporation;” every such per-
 son so offending shall be adjudged to be guilty of felony, without
 benefit of clergy.

The statute 1 Geo. 1. stat. 2. c. 25. s. 6. enacts, “That every
 “person or persons who shall counterfeit the hands of the trea-
 “surer, comptroller, surveyor, clerk of the acts, or of the com-
 “missioners of the navy, or any of them, or the hand or hands
 “of the signing or vouching officers of his Majesty’s navy, ships,
 “or yards, or the hand or hands of any one or more of them, to
 “any bill, ticket or other papers, by virtue whereof his Majesty’s
 “naval treasure is or may be paid or disposed of, or shall know-
 “ingly produce any such counterfeit ticket, bill or other paper;”
 every such person so offending, shall be committed to prison by
 the said officers or commissioners, or any one of them, until he
 shall find surety to appear at the next general assizes, or quarter
 sessions of the peace, for the county, &c. where such offender
 shall be so committed to prison, to be there proceeded against
 according to law.

The making or giving a *false certificate*, &c. upon the sale or
 disposal of *naval stores*, is subjected to a pecuniary fine of 200*l.*
 by the statute 39 & 40 Geo. 3. c. 89. s. 26. (k)

The statute 53 Geo. 3. c. 151. s. 12. relates to the forging, &c.
 the name or hand of the *registrar* of the court of admiralty, or
 of appeals for prizes, or of the cashiers of the bank, &c. to any
 certificate or writing, for the purpose of obtaining any of the mo-
 ney or effects of the suitors in those courts, and makes the of-
 fenders guilty of felony.

Counterfeiting
 the hand of
 the treasurer,
 &c. of the
 navy.

Forging, &c.
 the name or
 hand of the
registrar of the
court of admir-
alty, &c. for
the purpose of
obtaining the
money of the
suitors; 53
Geo. 3. c. 151.
s. 12.

(k) See *ante*, 272.

Forging, &c. the handwriting of the accountant-general, &c. of the court of Exchequer to any certificate, &c. to receive suitors' effects in the bank, or fraudulently claiming payments, felony without clergy.

The statute 1 G. 4. c. 35. enacts that if any person shall forge, &c. the name or handwriting of any accountant-general of the court of Exchequer or any Lord Chief Baron, or any of the barons of the said court, or of the clerk of the reports, or of any of the cashiers of the Bank of England, or of any officer of any other body politic, &c. to any certificate, report, entry, indorsement, transfer, declaration of trust, note, direction, authority, receipt, instrument, or writing whatsoever, for or in order to the receiving or obtaining any money or effects of any of the suitors of that court, or shall forge, &c. any certificate, &c., or shall utter, &c., or shall claim or demand payment of any sum or sums therein mentioned with intent to defraud, &c. such offender shall be guilty of felony without benefit of clergy.

Forging, &c. the hand of the treasurer of the ordnance, 46 Geo. 3. c. 45. s. 9.

By the statute 46 Geo. 3. c. 45. s. 9., the forging the hand of the *treasurer of the ordnance*, &c. to any draft or writing for obtaining money from the Bank of England, and the uttering any such draft, &c. knowing the same to be forged, were made capital offences.

Forging, &c. the name or hand of the agent general for volunteers and local militia, 54 Geo. 3. c. 151. s. 16.

The statute 54 Geo. 3. c. 151. s. 16. makes the forging, &c. the name or hand of the *agent general for volunteers and local militia* an offence liable to capital punishment. It enacts, "that if any person or persons shall knowingly and wilfully forge or counterfeit, or cause or procure to be forged or counterfeited, or knowingly or wilfully act or assist in forging or counterfeiting the name or hand of the agent general for the time being, or his deputy, or the person or persons duly authorised as aforesaid, to any bill of exchange, acceptance, draft, or instrument in writing whatsoever, for or in order to the receiving or obtaining any of the money in the hands or custody of the governor and company of the Bank of England, on account of the said agent-general; and shall forge or counterfeit, or cause or procure to be forged or counterfeited, or knowingly and wilfully act or assist in the forging or counterfeiting any bill of exchange, acceptance, draft, instrument, or writing in form of a draft, made by such agent-general or his deputy, or the person or persons authorised as aforesaid; or shall utter or publish any such, knowing the same to be forged or counterfeited, with an intention to defraud any person whomsoever;" every such person so offending shall be adjudged guilty of felony without benefit of clergy.

Forgery and false personation for the purpose of obtaining the pay, prize-money, pensions, &c. of soldiers and sailors.

Forgery and false personation for the purpose of obtaining the *pensions*, &c. of invalid soldiers were made punishable by the statute 46 Geo. 3. c. 69. s. 8. intitled "An act for making a better provision for soldiers." And forgery and false personation for the purpose of obtaining the prize-money or bounty-money of soldiers has been made the subject of severe punishment. (g) And forgery and false personation for the purpose of obtaining prize-money, pay, &c. of persons in the naval or marine services, were from time to time made punishable by a variety of statutes. (h)

(g) 49 Geo. 3. c. 123. s. 28.

(h) Amongst others the 31 Geo. 2. c. 10. s. 24. 9 Geo. 3. c. 30. s. 6. 32 Geo. 3. c. 33. s. 23. 32 Geo. 3. c. 34.

s. 29. 32 Geo. 3. c. 67. s. 12. 35

Geo. 3. c. 94. s. 34. 35 Geo. 3. c. 28.

s. 30. 45 Geo. 3. c. 72. s. 121. 49

Geo. 3. c. 123. s. 13, 28, 36. 49 Geo.

The statute 57 Geo. 3. c. 127. s. 4. subjected these offences to capital punishment, but with respect to the false personation of the names or characters of either soldiers or sailors for these fraudulent purposes the capital punishment is taken away by a recent statute 5 Geo. 4. c. 107. s. 5. which will be mentioned in a subsequent chapter. (i)

The statute 57 Geo. 3. c. 127. s. 4. after reciting the expediency of bringing into one act the several provisions made for the prevention and punishment of forgery for the purpose of obtaining prize-money, &c. enacts "that if any person or persons shall falsely make, forge, counterfeit, or alter, or cause or procure to be falsely made, forged, counterfeited or altered, or willingly act or assist in the false making, forging, counterfeiting, or altering any letter of attorney, order, bill, ticket, certificate of service, or other certificate whatsoever, assignment, last will, or other power or authority whatsoever, in order to receive or to enable any other person to receive any wages, pay, prize-money, bounty-money, pension-money, or other allowances of money due or supposed to be due for or in respect of the services of any such officer, seaman, marine, or other person as aforesaid, performed or supposed to have been performed on board of any ship or vessel of his Majesty, his heirs, &c. with intention to defraud any person or persons, body or bodies politic or corporate whatsoever; or shall utter or publish as true, or shall aid or assist in uttering or publishing as true, any false, forged, counterfeited, or altered, letter of attorney, order, bill, ticket, certificate of service, or other certificate whatsoever, assignment, last will or other power or authority whatsoever, in order to receive any wages, pay, prize-money, bounty-money, pension-money, or other allowances of money due or supposed to be due for or in respect of the services of any such officer, seaman, marine, or other person as aforesaid, performed or supposed to have been performed on board of any ship or vessel of his Majesty, his heirs, &c. with intention to defraud any person or persons, body or bodies politic or corporate whatsoever, knowing the same to be false, forged, counterfeited, or altered; or shall willingly and knowingly take a false oath to obtain the probate of any will or wills, or to obtain letters of administration, in order to receive or to enable any other person to receive any wages, pay, prize-money, bounty-money, pension-money, or other allowances of money due or supposed to be due for or in respect of the services of any such officer, seaman, marine, or other person as aforesaid, performed or supposed to have been performed on board of any ship or vessel of his Majesty, his heirs, &c.; or shall demand or receive any wages, pay, prize-money, bounty-money, pension-money, or other allowances of money due or supposed to be due for or in respect of the services of any such officer, seaman, marine, or other person as aforesaid, performed or supposed to have been performed on board any of his Majesty's ships or vessels, upon or

57 Geo. 3. c. 127. s. 4.

57 Geo. 3. c. 127. s. 4. Forging, &c. for the purpose of obtaining prize-money, pay, &c. of persons in the naval or marine services.

3. c. 108. s. 10. 54 Geo. 3. c. 93. s. 3. c. 60. s. 32.

89. 54 Geo. 3. c. 110. s. 6. 55 Geo. (i) *Post.* Chap. XL.

“ by virtue of any probate of any will or letters of administration, knowing the will on which such probate shall have been obtained to be false, forged, and counterfeited, or knowing the probate of such will, or such letters of administration as last aforesaid, to have been obtained by means of any such false oath as aforesaid, with intention to defraud any person or persons, body or bodies politic or corporate whatsoever,” every such person so offending shall be deemed guilty of felony without benefit of clergy. This clause is nearly similar to section 32 of the 55 Geo. 3. c. 60., but rather more comprehensive.

A subsequent statute, 59 Geo. 3. c. 56. contains further provisions upon this subject. It enacts, that no person shall receive any wages, pay, prize money, or bounty money due to any petty officer, seaman, non-commissioned officer of marines, or marine, supernumerary or boy under any orders made by any petty officer, &c. other than persons duly licensed in the manner mentioned in the act; but provides that nothing therein contained shall extend to prevent any such petty officer, &c. from giving such orders to receive their wages, &c. to their wives, or to relations being parents, children, or brothers or sisters of such petty officers, &c. (l) And then it enacts, that if any person shall falsely represent himself to be such relation in order to receive any prize money or bounty money, under any such order, or not being such relation, and not being licensed shall receive any wages, pay, prize money, bounty money, or other allowances for the use of such petty officer, &c. or if any agent or person whose licence shall have been revoked as thereafter mentioned shall offer himself to receive, or shall receive any such wages, &c. not being such relation, and shall be thereof convicted, such person shall be deemed guilty of a misdemeanor, and punished accordingly. (m) It makes the falsifying the date of any order for the payment of prize money, &c. a misdemeanor, &c. (n) And any person really entitled to prize money, &c. who shall by the production of a false certificate, or by making any false representation, obtain, or endeavour to obtain from Greenwich Hospital, or from any licensed agent, such prize money, &c. is to be deemed guilty of a misdemeanor, and to forfeit all prize money, &c. due to him. (o) By the 18th section of the act, the personating or falsely assuming the name or character of any person entitled to wages, prize money, &c. and the forging letters of attorney, &c. in order to receive any such wages, &c. and also the taking a false oath in order to obtain probate of any will, &c. with the same object, are made capital offences in words nearly similar to those contained in the 57 Geo. 3. c. 127. s. 4. (p)

The statute 1 & 2 Geo. 4. c. 4. one of the objects of which was to make further regulations in respect to the payment by remittance bill of the wages of seamen, enacts that all the enactments, clauses, powers, pains, &c. contained in the 55 Geo. 3. c. 60. applicable to the remittance bills in that act mentioned shall be deemed and

(l) S. 2.
(m) S. 3.
(n) S. 12.
(o) S. 17.

(p) S. 18. As to the false personation, see 5 Geo. 4. c. 107. s. 5. *post*. Chap. xl.

taken to be applicable to the remittance bills authorised by the new statute.

There are also some statutes which may probably be deemed to contain enactments still existing; as not being included in the general words of the consolidating statute 57 Geo. 3. c. 127., or of the 5 Geo. 4. c. 107.

The 49 Geo. 3. c. 35. entitled "an act for the more convenient payment of pensions to widows of officers of the navy," enacts, (s. 9.) "that if any person shall wilfully and knowingly personate, or falsely assume the name or character of, or procure any other person to personate or falsely assume the name or character of any widow entitled, or supposed to be entitled to any such pension aforesaid, in order to receive the same, or any part thereof, every such person so offending, and being lawfully convicted thereof, shall be deemed guilty of felony, and may be transported for such period, not exceeding fourteen years, as the Court shall adjudge." The tenth section enacts, "that if any person shall knowingly and wilfully forge or counterfeit, or cause or procure to be forged or counterfeited, or knowingly or wilfully act or assist in forging or counterfeiting, the name or handwriting of any widow entitled to any such pension, or of any person or persons required by any rules or regulations made under and by virtue of this act to sign any remittance bill, certificate, voucher, or receipt, in relation to the payment of any such pension, for and in order to the receiving or obtaining any money on any such pension, or shall utter as true any false, forged or counterfeited remittance bill, certificate, voucher, or receipt, knowing the same to be forged or counterfeited, with an intention to defraud any person whatsoever," every such person so offending shall be guilty of felony, and may be transported for such period, not exceeding fourteen years, as the said Court shall adjudge.

The 49 Geo. 3. c. 45. entitled, "an act for more conveniently paying of allowances on the compassionate list of the navy and of half-pay to officers of the royal marines," after reciting that it would greatly tend to the comfort and accommodation of persons receiving any sums of money or allowances in consequence of their names being inserted in the compassionate list of the navy, and also of the officers of the royal marines, entitled to half-pay, if such allowances and half-pay were paid to the persons respectively entitled thereto, at or near the places of their respective residences; and providing that persons entitled to such allowances and half-pay may, on application for that purpose, receive payments from the receiver-general of the land-tax, or collector of the customs and excise, &c., enacts, (s. 10.) "that if any person shall wilfully and knowingly personate, or falsely assume the name or character of, or procure any other person to personate, or falsely to assume the name or character of any person entitled, or supposed to be entitled, to any such allowance aforesaid, or of any officer of the royal marines on half-pay as aforesaid, in order to receive such allowance or half-pay, or any part thereof," every such person so offending shall be deemed guilty

Forgery, &c. in order to obtain half-pay allowances, pensions, &c.

49 Geo. 3. c. 35. s. 9 & 10.

Personating any widow entitled to a pension.

Section 10. Forging, &c. the name or handwriting of such widow; or of any person required to sign remittance-bills, certificates, &c.

49 Geo. 3. c. 45. s. 10. and 11. Personating persons entitled to allowances or half-pay, &c. and forging bills, certificates, &c.

of felony, and may be transported for such period not exceeding fourteen years, as the Court shall adjudge. The eleventh section enacts, "that if any person shall knowingly and wilfully forge or counterfeit, or cause or procure to be forged or counterfeited, or knowingly and wilfully act or assist in forging and counterfeiting, the name or handwriting of any person or officer entitled to any such allowance, or to such half-pay, or of any person or persons required by any rules or regulations made under and by virtue of this act, to sign any remittance bill, certificate, voucher, or receipt, in relation to the payment of any such allowance or half-pay, for and in order to the receiving or obtaining any money on any such allowance or half-pay; or shall utter as true any false, forged, or counterfeited remittance bill, certificate, voucher, or receipt, knowing the same to be forged or counterfeited, with an intention to defraud any person whatsoever;" every such person so offending shall be adjudged to be guilty of felony: and may be transported for such period, not exceeding fourteen years, as the said Court shall adjudge.

Falsely personating the name, &c. of a pensioner at Greenwich hospital, or forging, &c.

The personating or falsely assuming the name and character of a pensioner at *Greenwich* hospital, and the forging of any documents for the purpose of obtaining the pensions paid at that establishment, have been from time subjected to severe punishments. (q) A general enactment as to the offence of falsely personating the name or character of either soldier or sailor, for the purpose of obtaining any pension, prize money, &c. has been already referred to, and will be mentioned in a subsequent chapter. (r)

55 Geo. 3. c. 60. s. 30. Signing false petitions, &c. to the treasurer of the navy, to obtain a certificate from the inspector of seamen's wills, &c. or demanding wages, &c. upon false certificate.

The 55 Geo. 3. c. 60. s. 30. enacts, "that if any person shall sign or subscribe any petition or application to the treasurer or paymaster of his Majesty's navy for the time being, falsely and wilfully representing herself or himself to be the widow, or the nearest, or one of the nearest of kindred of any deceased petty officer or seaman, non-commissioned officer of marines or marine, who shall have belonged to or served on board any of his Majesty's ships or vessels, or utter or publish any such petition or application so signed or subscribed as aforesaid, containing such false and wilful representation as aforesaid, in order to obtain a certificate from the inspector of seamen's wills and powers to procure letters of administration to the effects of any such petty officer or seaman, non-commissioned officer of marines or marine, or to procure payment of any wages, pay, prize money, bounty money, or other allowances of money under twenty pounds, for or in respect of services on board any ship, or vessel of his Majesty, his heirs or successors; or if any per-

(q) See 3 Geo. 3. c. 16. s. 6. 43 Geo. 3. c. 119. s. 17. 54 Geo. 3. c. 110. s. 6. 58 Geo. 3. c. 64. s. 4. 6. 59 Geo. 3. c. 56. s. 12, 17; and 4 Geo. 4. c. 46. s. 1. which repeals so much of the 3 Geo. 3. c. 16. as excluded benefit of clergy from offenders personating any out-pensioner of Greenwich hospital, and

makes the felony thereby created punishable at the discretion of the Court, by transportation for life, or for any term not less than seven years, or by imprisonment and hard labour, not exceeding seven years.

(r) Post. chap. xl.

“son or persons shall demand or receive any wages, pay, prize money, bounty money or other allowance of money due or supposed to be due for or in respect of the services of any such petty officer or seaman, non-commissioned officer of marines or marine, upon or by virtue of any certificate from the said inspector of seamen’s wills, knowing such certificate to have been obtained by false representations or pretences,” every such person shall be transported beyond the seas for the term of seven years, in like manner as persons convicted of felony are directed to be transported by the laws and statutes of this realm. And the same statute (s. 31.) enacts, “that if any person shall falsely make, forge, or counterfeit, or cause or procure to be falsely made, forged, or counterfeited, or willingly act and assist in the false making, forging, or counterfeiting the signature of any minister or householder of any parish, to any certificate annexed or subjoined to or contained in any check or petition for a certificate, as required, described and mentioned in this act, to enable any person or persons to obtain probate of any will or letters of administration to any such petty officer or seaman, non-commissioned officer of marines or marine; or shall utter or publish as true any such certificate annexed or subjoined to or contained in any such check or petition, with any false, forged, or counterfeited signature of any such minister, or householder of any parish subscribed thereto, knowing the same signature to be false, forged, or counterfeited, with intention to defraud any person or persons, body or bodies politic or corporate whatsoever,” then every such person so offending shall be deemed guilty of felony, and be transported as a felon for the term of life, or fourteen years, or seven years, as the Court before which such offender shall be tried shall adjudge.

S. 31. Forgiving names of ministers, &c.

The statute 1 & 2 Geo. 4. c. 49. s. 3. reciting it to be expedient that the provisions in the 55 Geo. 3. c. 60. should be extended to the cases thereafter mentioned, enacts, “that if any person or persons shall cause or procure any other person to sign or subscribe, or utter or publish any such false petition or application to the treasurer or paymaster of his Majesty’s navy for the time being, as is mentioned in the said last mentioned act for any of the purposes mentioned in that act; or if any person or persons shall cause or procure any other person to demand or receive any wages, pay, prize money, bounty money, or other allowance of money, due or supposed to be due for or in respect of the services of any such petty officer or seaman, non-commissioned officer of marines or marine, upon or by virtue of any certificate from the inspector of seamen’s wills, or his assistant, knowing such certificate to have been obtained by false representations or pretences;” every such person shall, on being convicted of any such offence, be transported for the term of seven years.

1 & 2 Geo. 4. c. 49. s. 3. extends the 55 Geo. 3. c. 60. s. 30. to the procuring any other person to sign false petitions, &c. or to demand prize money, &c. upon false certificate.

The fourth section further enacts, “that if any person or persons shall cause or procure any other person to utter or publish as true, any false, forged, counterfeited, or altered letter of attorney, bill, ticket, certificate purporting to be a certificate from the inspector of seamen’s wills and powers or his assistant, assignment, last will, or other power or authority what-

And s. 4. of the 1 & 2 Geo. 4. c. 49. makes the procuring any person to utter any forged power or authority

mentioned in the 55th Geo. 3. c. 60. or to demand any pay, prize money, &c. upon a forged will, &c. felony without clergy.

“soever, mentioned in the 55th Geo. 3. c. 60. (s) for the purpose
 “and with the intention therein also mentioned, knowing the
 “same to be false, forged, counterfeited, or altered; or shall cause
 “or procure any other person to demand or receive any wages,
 “pay, prize money, bounty money, or other allowances of money
 “due, or supposed to be due, for or in respect of the services of
 “any such petty officer, seaman, non-commissioned officer of
 “marines, or marine, or other person, as in that act mentioned,
 “performed, or supposed to have been performed, on board of any
 “of his Majesty’s ships or vessels, upon or by virtue of any pro-
 “bate of any will or letters of administration, knowing the will
 “on which such probate shall have been obtained to be false,
 “forged, and counterfeited, or knowing the probate of such will,
 “or such letters of administration, as last aforesaid, to have been
 “obtained by means of any such false oath as in that act men-
 “tioned, with the intention therein also mentioned, every such
 “person or persons so offending, and being thereof convicted ac-
 “cording to due course of law, shall be deemed guilty of felony,
 “and shall suffer death as a felon without benefit of clergy.”

56 Geo. 3. c. 101. s. 4.
 Forging, &c.
 certificates,
 bills of ex-
 change, &c.
 used in draw-
 ing for half-
 pay, pensions,
 &c.

The statute 56 Geo. 3. c. 101. reciting that it would tend to the convenience and advantage of the commissioned and warrant officers in his Majesty’s navy on half pay, and of persons receiving pensions on the ordinary estimate of the navy, if they were enabled to draw for such half pay and pensions by bills of exchange on the commissioners of the navy, instead of being paid the same by remittance bills, provides a method for effecting such purpose; and then enacts, (s. 4.) “that if any person or persons shall
 “falsely make, forge, or counterfeit, or cause or procure to be
 “falsely made, forged, or counterfeited, or willingly act or assist
 “in the false making, forging, or counterfeiting of any such au-
 “thority or certificate, or bill of exchange, or assignment as afore-
 “said, or shall utter or publish as true any such false, forged, or
 “counterfeited authority or certificate, bill of exchange or assign-
 “ment, knowing the same to be false, forged, or counterfeited,
 “with intent to defraud any person or persons, body or bodies
 “politic or corporate,” every such person so offending shall be
 deemed guilty of felony without benefit of clergy.

Lyon’s case.
 Forging a
 power of at-
 torney, to re-
 ceive prize
 money, hold-
 en to be a ca-
 pital offence
 though not in
 the form pre-
 scribed by a
 particular sta-
 tute, 45 Geo.
 3. c. 72. s. 92.

A point may be here noticed, which arose upon the construction of the statutes by which powers of attorney to receive prize money were regulated. The prisoner had been convicted upon an indictment which contained counts charging him with having forged a power of attorney of one J. O. a midshipman in his Majesty’s service, to receive certain prize money then due, and also counts on the statute 2 Geo. 2. c. 25. charging him generally with the forgery of a deed. By the statute 45 Geo. 3. c. 72. s. 92. a form was prescribed for a negotiable order, by a petty officer on the agent, or treasurer of Greenwich hospital, with a certificate subjoined, &c. and the principal point made on behalf of the prisoner was whether this prescribed form of an order invalidated

(s) S. 32., the provisions of which are contained in the 57 Geo. 3. c. 127. s. 4. the object of which being to consolidate the provisions of different

statutes upon this subject, &c. why the present statute should refer to the prior act, 55 Geo. 3. c. 60.

every power for the purpose of receiving prize money couched in other terms and in a different form than were contained in that statute. It is understood that, the point being submitted to the consideration of the twelve Judges, all of them (with the exception of Graham, B., who dissented), thought that the forging a power of attorney, though not in the prescribed form, was a capital offence, and that the conviction was right: and that most of the Judges thought that the power of attorney in question was a deed within the statute 2 Geo. 2. c. 25.(t)

It has been holden that the *muster books* of the King's ships, documented in the navy-office, to which returns are regularly made, by the several commanders, of the names, &c. of their respective crews, may be admitted as evidence of the persons therein named, having served on board the several ships in the capacities there mentioned.(u)

Muster books, in the navy-office, evidence.

By the 3 Geo. 4. c. 51. an act passed for apportioning the burthen occasioned by the military and naval pensions and superannuations, by vesting an equal annuity in trustees for the payment thereof, it is enacted, that if any person shall forge, &c. any receipt for the said annuity, or any certificate of the trustees by the act directed to be given respecting the sale of the said annuity, or shall alter, &c., or utter, &c. with intent to defraud, such offender shall be adjudged guilty of felony, and suffer death without benefit of clergy.(x)

3 Geo. 4. c. 51. s. 15. Forging, &c. any receipts or certificates of annuity for military and naval pensions.

The statute 4 Geo. 2. c. 18. s. 1. having reference to the treaties between this kingdom and the Barbary powers; by which, on producing a pass in a certain form, those powers agreed to let British vessels go free, enacted, "That if any person or persons shall within Great Britain or Ireland, or any other his Majesty's dominions, or without, falsely make, forge or counterfeit, or cause or procure to be falsely made, forged or counterfeited, or wittingly or knowingly act or assist in the false making, forging or counterfeiting any pass or passes for any ship or ships whatsoever, commonly called a Mediterranean pass or Mediterranean passes, or shall counterfeit the seal of the said office, or the hand or hands of the lord high-admiral of Great Britain and Ireland for the time being, or of any commissioner or commissioners for executing the said office for the time being, to any such pass or passes, or shall alter or erase any true and authentic pass or passes issued or made out by the lord high-admiral of Great Britain and Ireland, or the commissioners for executing the said office for the time being, or shall utter or publish as true any such false, forged, counterfeited, altered or erased pass or passes, knowing the same to be false, forged, counterfeited, altered or erased, all and every such person and persons, being in due form of law convicted of any of the offences aforesaid in any proper Court of Great Britain, Ireland,

Forging, &c. any Mediterranean pass, 4 Geo. 2. c. 18. s. 1.

(t) *Rex v. Ricketts Lyon*, O.B. 1813, MS. As to the statute 2 Geo. 2. c. 25. see *post*. Chap. xxxix

(u) *Rhodes's case*, 1 Leach 24. *Rex v. Fitzgerald and Lee* 1 Leach

20. 2 East. P. C. c. 19. s. 25. p. 911. *Tannet's case*, *cor.* Wood, B., *Kent* Lent Ass. 1818, MS.

(x) S. 15.

"or any of his Majesty's plantations beyond the seas, where such offence shall be committed respectively, shall be adjudged guilty of felony, and shall suffer death as in cases of felony, without benefit of clergy." By the second section it is provided, that such offences committed in any country or place out of Great Britain, either within or without his Majesty's dominions, may be inquired of, &c. in any county of Great Britain, by virtue of the King's commission of oyer and terminer and gaol delivery, or before any Court of justiciary in Scotland, &c.

Forging, &c.
certificates, &c.
relating to the
Slave Trade.
5 Geo. 4. c.
113. s. 10.

The statute 5 Geo. 4. c. 113., entitled "An act to amend and consolidate the laws relating to the abolition of the slave trade," enacts, (s. 10.) "that if any persons shall wilfully and fraudulently forge or counterfeit any certificates, certificate of valuation, sentence or decree of condemnation or restitution, copy of sentence or decree of condemnation or restitution, or any receipt, (such receipts being required by this act,) or any part of such certificate, certificate of valuation, sentence or decree of condemnation or restitution, copy of sentence or decree of condemnation or restitution, or receipt as aforesaid; or shall knowingly and wilfully utter or publish the same, knowing it to be forged or counterfeited, with intent to defraud his Majesty, his heirs or successors, or any other person or persons whatsoever, or any body politic or corporate; then and in every such case the person or persons so offending, and their procurers, counsellors, aiders and abettors, shall be and are hereby declared to be felons, and shall be transported beyond seas for a term not exceeding fourteen years, or shall be confined and kept to hard labour for a term not exceeding five years, nor less than three years, at the discretion of the Court before whom such offender or offenders shall be tried and convicted."

Forging, &c.
Quarantine
certificates, 6
Geo. 4. c. 78.
s. 25.

The 6 Geo. 4. c. 78. s. 25. enacts, "that if any person shall knowingly or wilfully forge or counterfeit, interline, erase or alter, or procure to be forged or counterfeited, interlined, erased or altered, any certificate directed or required to be granted by any order of his Majesty, his heirs or successors, in council, now in force or hereafter to be made, touching quarantine, or shall publish any such forged or counterfeited, interlined, erased or altered certificate, knowing the same to be forged or counterfeited, interlined, erased or altered, or shall knowingly and wilfully utter and publish any such certificate, with intent to obtain the effect of a true certificate to be given thereto, knowing the contents of such certificate to be false, he or she shall be guilty of felony."

Counterfeiting
licences for na-
vigating ships,
&c. 47 Geo. 3.
sess. 2. c. 66.
s. 26.

The statute 47 Geo. 3. sess. 2. c. 66. was passed for the purpose of making more effectual provision for the prevention of smuggling; and, after authorising certain persons therein mentioned to grant licences for navigating, &c. it enacts, (s. 26.) "That if any person or persons shall counterfeit, erase, alter, or falsify, or cause to be counterfeited, erased, altered, or falsified, any licence which has been granted by the lord high-admiral of Great Britain, or by the commissioners of the admiralty for the time being, or by any person authorised by them to grant such licence, or which shall, in pursuance of this act, be granted by

"the commissioners of his Majesty's customs in England, Scotland, or Ireland, respectively, or any three of them for the time being, or shall knowingly or wilfully make use of any licence so counterfeited, erased, altered, or falsified, such person or persons shall for every such offence forfeit the sum of five hundred pounds."

By the 12 Geo. 1. c. 32., which was passed for the better securing the monies and effects of the suitors of the Court of Chancery, it is enacted, (s. 9.) "That if any person or persons shall forge or counterfeit, or procure to be forged or counterfeited, or willingly act or assist in the forging or counterfeiting the name or hand of the said accountant-general, the said register, the said clerk of the report-office, or any of the cashiers of the said governor and company of the Bank of England, to any certificate, report, entry, indorsement, declaration of trust, note, direction, authority, instrument or writing whatsoever, for or in order to the receiving or obtaining any the money or effects of any of the suitors of the said Court of Chancery, or shall forge or counterfeit, or procure to be forged or counterfeited, or wilfully act or assist in forging or counterfeiting any certificate, report, entry, indorsement, declaration of trust, note, direction, authority, instrument or writing in form of a certificate, report, entry, indorsement, declaration of trust, note, direction, authority, instrument or writing, made by such accountant-general, register, clerk of the report-office, or any of the cashiers of the said governor and company of the Bank of England, or shall utter or publish any such, knowing the same to be forged or counterfeited, with intention to defraud any person whatsoever;" then every such person so offending shall be adjudged to be guilty of felony, without benefit of clergy.

In a case upon this statute the prisoner was indicted for forging a writing, purporting to be *an office-copy of a report of the accountant-general* of money being paid into the Bank pursuant to an order of Chancery, and also *an office-copy of a certificate of one of the cashiers of the Bank*, of the payment of the money into the Bank. The second count was for publishing the same, knowing them to be forged, with intent to defraud, &c. And the third and fourth counts were, the one for forging, the other for publishing a writing in form of a writing purporting to be *an office-copy of the certificate of the accountant-general*, and *an office-copy of the receipt of the cashier of the Bank*. There were other counts in the indictment, of which the defendant was acquitted. The certificate and receipt were set out verbatim in all the counts; and the offence was laid to be done with intent to defraud William Hunt. Upon the trial a special verdict was found, which was afterwards argued before Lord Mansfield and nine of the other Judges. After the argument, Lord Mansfield observed, that the verdict left but one question to consider, namely, Whether the offence was within the statute 12 Geo. 1. c. 32. s. 9., and said that if they had any doubts, the Judges would appoint it to be argued again the next term; and therefore their Lordships deferred giving their opinion. But, in a subsequent term, eleven of

Forging documents relating to the monies, &c. of suitors in Chancery, 12 Geo. 1. c. 32. s. 9.

Gibson's case. Forging a writing, purporting to be *an office-copy of a report of the accountant-general*, of money being paid into the Bank; and also *an office-copy of a certificate of one of the cashiers of the Bank*, is within the 12 Geo. 1. c. 32. s. 9.

the Judges met at Serjeant's Inn; and they were of opinion that *the indictment and the special verdict were sufficient*, and needed no amendment; and that the case was within the statute. (y)

Making false entries in parish registers, as to any marriage; forging, &c. a marriage licence; and destroying register of marriages, 4 Geo. 4. c. 76. s. 28.

The statute 4 Geo. 4. c. 76. s. 28. enacts, that immediately after the celebration of every marriage, an entry thereof shall be made in the register book, provided and kept for that purpose as by law now directed, or as shall be hereafter directed, in which entry or register, it shall be expressed that the said marriage was celebrated by banns or licence, and if both or either of the parties married by licence be under age, not being a widower or widow, with consent of the parents or guardians, as the case shall be : and such entry shall be signed by the minister with his proper addition, and also by the parties married, and attested by such two witnesses ; which entry shall be made in form, or to the effect following ; that is to say,

Form.

A. B. of {the
this} parish, and C. D. of {the
this} parish,
we're married in this {church
chapel} by {banns
licence} with
consent of {parents
guardians} this day of in the year
By me J. L. {Rector.
Vicar.
Curate.

This marriage was solemnized between us

{A. B.
{C. D.

In the presence of {E. F.
{G. H.

The 29th section of the same statute, then enacts, " That if any person shall, from and after the first day of November, 1823, with intent to elude the force of this act, knowingly and wilfully insert, or cause to be inserted in the register book of such parish or chapelry as aforesaid, any false entry of any matter or thing relating to any marriage ; or falsely make, alter, forge, or counterfeit, or cause or procure to be falsely made, altered, forged, or counterfeited, or act or assist in falsely making, altering, forging, or counterfeiting any such entry in such register ; or falsely make, alter, forge or counterfeit, or cause or procure to be falsely made, altered, forged or counterfeited, or assist in falsely making, altering, forging or counterfeiting any such licence of marriage as aforesaid ; or utter or publish as true any such false, altered, forged or counterfeited register as aforesaid ; or a copy thereof, or any such false, altered, forged or counterfeited licence of marriage, knowing such register or

(y) Gibson's case, O. B. 1766. Hil. T. 1768, 1 Leach 61. 2 East. P. C. c. 19. s. 22. p. 899., in which last authority the special verdict is fully stated, and the arguments of counsel

given at considerable length, for the reason that the particular grounds on which the case was decided are not declared in the note. The prisoner was executed. 1 Leach 63.

“ licence of marriage respectively to be false, altered, forged or counterfeited; or if any person shall, from and after the said first day of November, wilfully destroy, or cause or procure to be destroyed any register book of marriages, or any part of such register book, with intent to avoid any marriage, or to subject any person to any of the penalties of this act; every person so offending, and being thereof lawfully convicted, shall be deemed and adjudged guilty of felony, and shall suffer the punishment of transportation for life, according to the laws in force for the transportation of felons.”

The late statute 52 Geo. 3. c. 146., which was passed for the better regulating and preserving parish and other registers of birtha, baptisms, marriages, and burials, after providing as to the register-books to be kept, and copies, &c. to be transmitted, &c. enacts, (s. 14.) “ That if any person shall knowingly and wilfully insert, or cause, or permit to be inserted in any such register-book of such baptisms, burials or marriages as aforesaid, or in any such copy of any such register so directed to be transmitted to the registrars as aforesaid, or in any such lists or declarations also directed to be transmitted to such registrars as aforesaid, any false entry of any matter or thing relating to any baptism, burial or marriage, or shall falsely make, alter, forge or counterfeit, or cause or procure, or wilfully permit to be falsely made, altered, forged or counterfeited, any part of any such register, list or declaration, or of any such copy of any such register; or shall wilfully destroy, deface or injure, or cause or procure, or permit to be destroyed, defaced or injured, any such register-book, or any part thereof; or shall knowingly and wilfully sign, or certify any copy of any such register hereby required to be transmitted as aforesaid, which shall be false in any part thereof, knowing the same to be false;” every person so offending shall be adjudged to be guilty of felony, and shall be transported for the term of fourteen years. The twentieth section contains a proviso that nothing in this act contained shall extend to repeal any provision contained in the 26 Geo. 2. c. 33.

The statutes authorising government to raise money by way of annuities, as the 29 Geo. 3. c. 41., the 48 Geo. 3. c. 142., and the 49 Geo. 3. c. 64., usually contain clauses making it a capital offence to forge, &c. any register, certificate, affidavit, &c. therein mentioned, or to personate any true nominee. The 48 Geo. 3. c. 142. s. 27. enacts, “ That if any person or persons shall forge, counterfeit, or alter, or cause or procure to be forged, counterfeited, or altered, or knowingly or wilfully act or assist in the forging, counterfeiting, or altering any register or registers of the birth or baptism of any person or persons to be appointed a nominee or nominees under the provisions of this act, or any copy or certificate of any such register, or the name or names of any witness or witnesses to any such certificate, or any affidavit or affirmation required to be taken for any of the purposes of this act, or the certificate of any judge, baron of the exchequer, justice of the peace, or magistrate, of any such affidavit or affirmation having been taken before him, or any certificate of

Making false entries in any register of baptisms, burials, or marriages; forging, &c. or destroying the register, 52 Geo. 3. c. 146.

Forging, &c. any register, certificate, &c. mentioned in the statutes concerning life annuities, or personating any nominee, 48 Geo. 3. c. 142. s. 27.

“any governor or person acting as such, or minister or consul, or chief magistrate of any province, town or place, or other person authorised by this act to grant any certificate of the life or death of any nominee, or any certificate or certificates of the officer to be appointed by the said commissioners for the reduction of the national debt, or of any cashier or clerk of the Bank of England, or shall forge or counterfeit, or shall cause or procure to be forged or counterfeited, or knowingly or wilfully act or assist in the forging or counterfeiting the name or names of any person or persons in or to any transfer of bank annuities for the purchase of any life annuity, or in or to any transfer or acceptance of any life annuity in the books of the governor and company of the Bank of England, or any receipt or discharge for any life annuity, or for any payment or payments due or to become due thereon, or to any letter of attorney, or other authority or instrument, to transfer or accept any bank annuities or life annuities under the provisions of this act, or to receive any life annuities, or any payment or payments due or to become due thereon. or shall wilfully, falsely, and deceitfully personate any true and real nominee or nominees, or shall wilfully deliver or produce to any person or persons acting under the authority of this act, or shall utter any such forged register, certificate, affidavit, or affirmation, knowing the same to be forged, counterfeited, or altered, with intent to defraud his majesty, his heirs, &c. or any other person or persons whomsoever;” then, and in every such case, all and every person or persons so offending, shall be adjudged guilty of felony, without benefit of clergy. The 49 Geo. 3. c. 64. was passed to amend the 48 Geo. 3. c. 142.; and (by s. 3.) it enacts, “That if any person or persons shall wilfully, falsely, and deceitfully, personate any true and real nominee or nominees, or shall wilfully, falsely, and deceitfully represent any other person or persons than the true and real nominee or nominees to be such true or real nominee or nominees, or shall forge, counterfeit, or alter, or act, or assist in forging, counterfeiting, or altering any certificate or certificates to be granted by the said officer in pursuance of this act, or shall utter any such forged certificate knowing the same to be forged, counterfeited or altered, with intent to defraud his majesty, his heirs, &c. or any other person or persons whomsoever;” then, and in every such case, every such person so offending shall be adjudged guilty of felony, without benefit of clergy.

49 Geo. 3. c.
64. s. 3. amends
the 48 Geo. 3.
c. 142.

Forging any
memorial, cer-
tificate, &c.
of deeds, wills,
&c. of land,
&c. registered
in the West
and North
Ridings of
Yorkshire, or
in Middlesex:
2 & 3 Ann. c. 4.
5 Ann. c. 18.
7 Ann. c. 20.
8 Geo. 2. c. 6.

By the statute 2 & 3 Ann. c. 4. which was passed for the public registering of all deeds, conveyances, and wills of any honors, manors, lands, tenements, or hereditaments, within the *West Riding* of the county of *York*, it is directed that a memorial of such deeds, &c. be registered in a certain manner at Wakefield, and that the registrar shall indorse a certificate of such registry on every such deed, &c.: and the nineteenth section enacts, “that if any person or persons shall at any time forge or counterfeit any such memorial or certificate as are hereinbefore mentioned and directed, and be thereof lawfully convicted, such person or persons shall incur and be liable to such pains and penalties, as in and

"by the 5 Eliz. c. 14. (y) are imposed upon persons for forging
 "or publishing of false deeds, charters or writings sealed, court
 "rolls or wills, whereby the freehold or inheritance of any person
 "or persons of, in or to any lands, tenements or hereditaments,
 "shall or may be molested, troubled or charged." The 5 & 6 Ann.
 c. 18. after directing that all *bargains and sales* of any manors,
 lands, &c. within the *West Riding* of the county of *York*, shall be
 registered at Wakefield, and indorsed by the registrar; that the
 enrolment of every such deed shall be deemed a memorial pursuant
 to the former statute 2 & 3 Ann. c. 4.; and that no judgment,
 statute, &c. shall bind any manors, lands, &c. but only from the
 time a memorial thereof shall be registered in the office; enacts,
 (s. 8.) "that if any person or persons shall at any time forge or
 "counterfeit any entry of the acknowledgment of any bargainer in
 "any such bargain and sale as aforesaid, or any such memorial,
 "certificate or indorsement as are herein mentioned or directed,
 "and be thereof lawfully convicted," such person or persons shall
 incur the pains and penalties of the same statute 5 Eliz. c. 14. (z)
 The provisions of these statutes of 2 & 3 Ann. and 5 & 6 Ann. are
 extended by the statute 8 Geo. 2. c. 6. s. 31. to the *North Riding*
 of the county of *York*. And the statute 7 Ann. c. 20. which was
 passed for the public registering of deeds, conveyances, wills, and
 other incumbrances affecting any honors, manors, lands, &c. within
 the county of *Middlesex*, after directing as to the memorials, cer-
 tificates, &c. enacts (s. 15.) "that if any person or persons shall
 "at any time forge or counterfeit any entry of the acknowledg-
 "ment of any such memorial, certificate or indorsement, as is
 "herein mentioned or directed, and be thereof lawfully convict-
 "ed," such person or persons shall incur the pains and penalties
 of the same statute 5 Eliz. c. 14. (a)

The statute 54 Geo. 3. c. 133. entitled "an act for better en-
 "abling the commissioners of stamps to make allowances for
 "spoiled stamps on policies of insurance in Great Britain, and for
 "preventing frauds relating thereto," enacts, (by s. 10.) "that if
 "any person shall forge or counterfeit, or cause or procure to be
 "forged or counterfeited, or willingly aid or assist in the forging
 "or counterfeiting of the name or handwriting of any underwriter
 "on any policy of insurance, to any declaration of any return of
 "the premium on such policy, or any part thereof, or shall frau-
 "dulently alter, or cause or procure to be altered, or aid or as-
 "sist in altering any such declaration, after the same shall have
 "been signed by any underwriter, or shall utter or make use of
 "any such declaration, knowing the same to have been fraudu-
 "lently altered, or the name or handwriting of any underwriter
 "to have been forged or counterfeited thereon, for the purpose of
 "obtaining any such allowance as aforesaid, and with intent to
 "defraud his Majesty, his heirs, &c. every person so offending
 "shall, for the first offence, forfeit the sum of five hundred
 "pounds, to be paid to his Majesty, his heirs or successors, and
 "to be recovered in the same manner as other penalties imposed

Forging, &c.
 declaration of
 return of the
 premium on a
 policy of in-
 surance. 54
 Geo. 3. c. 133.
 s. 10.

(y) See this statute *post.* Chap.
 XXXIX.

(z) *Ante*, note (y)
 (a) *Ante*, note (y).

“ by any of the laws now in force relating to stamp duties ; and
 “ for the second and every other offence shall be adjudged guilty
 “ of felony, and shall be transported for seven years to parts be-
 “ yond the seas.” All the powers, provisions, pains, penalties,
 &c. of this act are extended by a statute passed in the same ses-
 sion, 54 Geo. 3. c. 144. s. 11. to the *contracts of insurance*, and
 to the allowance of stamp duty in the cases therein specified.

Forging, &c.
 the name or
 handwriting of
 the surveyor-
 general of the
 woods and fo-
 rests, 46 Geo.
 3. c. 142. s. 14.

The statute 46 Geo. 3. c. 142. which was passed for the better
 regulation of the office of *surveyor-general of the woods and
 forests*, enacts, (s. 14.) “ that if any person or persons shall
 “ knowingly and wilfully forge or counterfeit, or cause or procure
 “ to be forged or counterfeited, or knowingly and wilfully act or
 “ assist in forging or counterfeiting the name or handwriting of
 “ the surveyor-general of the woods and forests for the time being,
 “ or his deputy, to any draft, instrument, or writing whatsoever,
 “ for or in order to the receiving or obtaining any of the money
 “ in the hands or custody of the Governor and Company of the
 “ Bank of England, on account of the surveyor-general of the woods
 “ and forests, or shall forge or counterfeit, or cause or procure to
 “ be forged or counterfeited, or knowingly and wilfully act or as-
 “ sist in the forging or counterfeiting of any draft, instrument, or
 “ writing in form of a draft, made by such surveyor-general or
 “ his deputy, or the person or persons authorised as aforesaid, or
 “ shall utter or publish any such, knowing the same to be forged
 “ or counterfeited, with an intent to defraud any person whomso-
 “ ever,” every such offender shall be adjudged guilty of felony
 without benefit of clergy.

Forging, &c.
 of any hawk-
 er's licence, 50
 Geo. 3. c. 41.
 s. 18.

The offences of forging or counterfeiting any *hawker's licence*,
 directed to be granted by the 50 Geo. 3. c. 41. or the travelling with
 or producing or shewing any such forged licence for the purposes
 in the act mentioned, are made punishable by the act (s. 18.) by a
 pecuniary forfeiture of 300*l*.

CHAPTER THE THIRTY-NINTH.

OF THE FORGERY OF PRIVATE PAPERS, SECURITIES, AND DOCUMENTS.

THE statute 5 Eliz. c. 14. s. 2. enacts, "that if any person or persons whatsoever, upon his or their own head and imagination or by false conspiracy and fraud with others, shall wittingly, subtilly, and falsely forge or make, or subtilly cause or willingly assent to be forged or made, any false deed, charter, or writing sealed, court-roll, or the will of any person or persons in writing, to the intent that the estate of freehold or inheritance of any person or persons, of, in, or to any lands, tenements, or hereditaments, freehold or copyhold, or the right, title, or interest, of any person or persons, of, in, or to the same, or any of them, shall or may be molested, troubled, defeated, recovered, or charged; or shall pronounce, publish or shew forth in evidence, any such false and forged deed, charter, writing, court-roll, or will, as true, knowing the same to be false and forged, as is aforesaid, to the intent above-remembered, and shall be thereof convicted, either upon action or actions of forger of false deeds, to be founded upon this statute, at the suit of the party grieved, or otherwise, according to the order and due course of the laws of this realm, or upon bill or information to be exhibited into the court of the star-chamber, according to the order and use of that court, shall pay unto the party grieved his double costs and damages, to be found or assessed in that court where such conviction shall be, and also shall be set upon the pillory (a) in some open market town, or other open place, and there to have both his ears cut off, and also his nostrils to be slit and cut, and seared with a hot iron, so as they may remain for a perpetual note or mark of his falsehood, and shall forfeit to the queen our sovereign lady, her heirs and successors, the whole issues and profits of his lands and tenements during his life, and also shall suffer and have perpetual imprisonment during his life."

5 Eliz. c. 14. s. 2. Forging deeds, charters, writings sealed, court rolls, or wills, to the intent to molest the freehold or inheritance of some person.

(a) As to this part of the punishment, see now 56 Geo. 3. c. 138.

5 Eliz. c. 14. s. 3. Forging, &c. any charter, deed, or writing, to the prejudice of termors, and forging any obligation or bill obligatory, or any acquittance, release, &c.

The third section enacts, "that if any person or persons upon his or their own head or imagination, or by false conspiracy or fraud had with any other, shall wittingly, subtilly and falsely forge or make, or wittingly, subtilly, and falsely cause or assent to be made and forged, any false charter, deed or writing, to the intent that any person or persons shall or may have or claim any estate or interest for term of years, of, in, or to any manors, lands, tenements or hereditaments, not being copyhold, or any annuity in fee simple, fee tail or for term of life, lives or years; or after the said day shall, as is aforesaid, forge, make, or cause or assent to be made or forged, any obligation or bill obligatory, or any acquittance, release or other discharge of any debt, accompt, action, suit, demand, or other things personal; or if any person or persons shall pronounce, publish, or give in evidence, any such false and forged charter, deed, writing, obligation, bill obligatory, acquittance, release, or discharge; as true, knowing the same to be false and forged, and shall be thereof convicted by any the ways and means aforesaid, that then he shall pay unto the party grieved his double costs and damages, to be found and assessed in such court where the said conviction shall be had, and shall be also set upon the pillory (b) in some open market town, or other open place, and there to have one of his ears cut off, and shall also have and suffer imprisonment by the space of one whole year, without bail or mainprize."

Other clauses of the statute.

A defendant convicted for any of these offences under the act, and having received corporal punishment thereupon according to the act, is not to be impeached for the same offence. (c) But (by section 7.) "if any person or persons being hereafter convicted or condemned of any of the offences aforesaid, by any the ways or means above limited, shall after any such his or their conviction or condemnation afterwards commit or perpetrate any of the said offences in form aforesaid, that then every such second offence or offences shall be adjudged felony;" and the parties being convicted or attainted thereof shall suffer such pains of death, forfeiture, &c. as in cases of felony, without benefit of clergy. (d) Jurisdiction to hear and determine offences against the statute is given to justices of oyer and terminer, and of assize. (e) And it is provided that the act shall not extend "to any attorney, lawyer, or counsellor, that shall, for his client, plead, shew forth, or give in evidence any false and forged deed, charter, will, court-roll, or other writing, for true and good, being not party or privy to forging of the same, for the pleading, shewing

(b) See *ante*, note (a)

(c) S. 5.

(d) There must be a conviction by judgment of a first offence, before the second offence committed, to make it felony; and the record of the first conviction must be set out in the indictment for the second offence, in order that it may appear to be a conviction for some offence within the

statute, 3 Inst. 172. 1 Hale 686. 2 East. P. C. c. 19. s. 32. p. 919. This section of the statute includes one, who, having been convicted for forging a deed, afterwards knowingly publishes the forged deed of another, *Id. ibid.*

(e) This does not extend to justices of the peace at their quarter sessions. See *ante*, 371.

"forth, or giving in evidence the same." (f) And also that the act shall not extend to any person or persons "that shall plead "or shew forth any deed or writing exemplified under the great "seal of England, or under the seal of any other authentic court "of this realm; nor shall extend to any judge or justice, or other "person, that shall cause any seal of any court to be set to any "such deed, charter, or writing inrolled, not knowing the same "to be false or forged." (g) There is also a similar exception as to proctors, advocates, &c. of the ecclesiastical courts. (h)

It has been holden to be in the election of the party in the case of forging deeds to lay the indictment either at common law, or upon the statute of 5 Eliz. c. 14. (i) And as this statute appears to have been considered, some years ago, as having nearly fallen into disuse, (k) it may be deemed sufficient merely to refer in this place to the books in which the cases upon the construction of it are to be found collected. (l) In one of the latest of those cases it was holden that the statute did not mean that there should be a forged conveyance of the very lands; but if it were any deed whereby the party *might* be molested, it was sufficient. (m) And a variance as to the description of the lands was holden not to be material. (n)

Construction.

The more modern statutes which require to be noticed in relation to the forgery of private papers, securities, and documents, are the 2 Geo. 2. c. 25. (extended to forgeries with intent to defraud any corporation by 31 Geo. 2. c. 22, s. 78.) the 7 Geo. 2. c. 22. (extended in like manner by 18 Geo. 3. c. 18.) the 43 Geo. 3. c. 139. (as to the forging of *foreign* bills of exchange, &c.) and the 45 Geo. 3. c. 89. The same general rules of construction will apply equally to the same instruments named in the several statutes passed in *pari materia*; and all must necessarily be governed by the same principles of the common law. (o)

More modern statutes.

The 2 Geo. 2. c. 25. s. 1. enacts, "that if any person shall "falsely make, forge, or counterfeit, or cause or procure to be "falsely made, forged, or counterfeited, or willingly act or assist in "the false making, forging, or counterfeiting any deed, will, "testament, bond, writing obligatory, bill of exchange, promissory note for payment of money, indorsement or assignment of "any bill of exchange or promissory note for payment of money, or any acquittance or receipt, either for money or goods, "with intention to defraud any person whatsoever, or shall utter "or publish as true any false, forged, or counterfeited deed, will, "testament, bond, writing obligatory, bill of exchange, promissory note for payment of money, indorsement, or assignment of "any bill of exchange or promissory note for payment of money, "acquittance or receipt, either for money or goods, with intention

2 Geo. 2. c. 25. s. 1. Forging, &c. any deed, will, bond, note, acquittance, receipt, &c. or uttering, &c. felony without clergy.

(f) S. 15.

(g) S. 16.

(h) S. 12.

(i) *Obrian's case*, 2 Str. 1144.

(k) 2 East. P. C. c. 19. s. 33. p. 919.

(l) 3 Inst. Cap. lxxv. p. 168. *et sequ.*
1 Hale 682. *et sequ.* 1 Hawk. P. C. c. 70. s. 12. *et sequ.* 3 Bac. Ab. *For-**gery* (C.) 2 East. P. C. c. 19. s. 33. p. 919. *et sequ.*(m) *Crooke's case*, 2 Str. 901. 2 East. P. C. c. 19. s. 33. p. 921. *Ante*, 338.(n) *Id. ibid.*

(o) 2 East. P. C. c. 19. s. 33. p. 920.

31 Geo. 2. c. 22. s. 78. extends the act to corporations.

7 Geo. 2. c. 22. Forging, &c. any acceptance of any bill of exchange, or the number or sum of an accountable receipt for any note, &c. or any warrant or order for payment of money or delivery of goods; or uttering, &c.; felony without clergy.

Extended to corporations by 18 Geo. 3. c. 18.

43 Geo. 3. c. 139. s. 1. Forging, &c. foreign bills of exchange, notes, &c. or uttering, &c. felony punishable by transportation for fourteen years.

“to defraud any person, knowing the same to be false, forged, or counterfeited;” then every such person shall be deemed guilty of felony, and suffer death as a felon, without benefit of clergy. The statute 31 Geo. 2. c. 22. s. 78., reciting that doubts might arise whether the punishment, under the former statute, extended to forgeries with intent to defraud any *corporation*, supplies the supposed defect.

The statute 7 Geo. 2. c. 22. enacts, “that if any person shall falsely make, alter, forge, or counterfeit, or cause, or procure to be falsely made, altered, forged, or counterfeited, or willingly act or assist in the false making, altering, forging, or counterfeiting any acceptance of any bill of exchange, or the number or principal sum of any accountable receipt for any note, bill, or other security for payment of money, or any warrant or order for payment of money, or delivery of goods, with intention to defraud any person whatsoever, or shall utter or publish as true any false, altered, forged, or counterfeited acceptance of any bill of exchange, or accountable receipt for any note, bill, or other security for payment of money, or warrant or order for payment of money, or delivery of goods, with intention to defraud any person, knowing the same to be false, altered, forged, or counterfeited;” then every such person shall be deemed guilty of felony without benefit of clergy. The 18 Geo. 3. c. 18. contains similar provisions as to such forgeries committed with intent to defraud any *corporation*.

The statute 43 Geo. 3. c. 139. was passed for the prevention of the forging of *foreign* bills of exchange, promissory notes, &c. and enacts, “that if any person shall, within any part of the United Kingdom of Great Britain and Ireland, falsely make, forge, or counterfeit, or cause or procure to be falsely made, forged, or counterfeited, or knowingly aid or assist in the false making, forging, or counterfeiting any bill of exchange, or any promissory note, undertaking, or order for the payment of money, purporting to be the bill of exchange, promissory note, undertaking, or order for the payment of money, of any foreign prince, state, or country whatsoever, or of any minister or officer entrusted by or employed in the service of any foreign prince, state, or country, or of any person, or company of persons resident in any foreign state or country, or of any body corporate and politic, and body in the nature of a body corporate and politic, created or constituted by any foreign prince or state, with intent to deceive or defraud his Majesty, his heirs, &c. or any such foreign prince, state, or country, or with intent to deceive or defraud any person or company of persons whomsoever, or any body corporate and politic, or body in the nature of a body corporate and politic whatsoever, whether the same be respectively resident, carrying on business, constituted or being in any part of the United Kingdom, or in any foreign state or country, and whether such bill of exchange, promissory note, or order, be in the English language, or in any foreign language or languages, or partly in one and partly in the other; or if any person shall, within any part of the said United Kingdom, tender in payment or in exchange, or other-

“wise utter or publish as true, any such false, forged, or counterfeited bill of exchange, promissory note, undertaking, or order, knowing the same to be false, forged, or counterfeited, with intent to deceive or defraud his Majesty, his heirs, &c. or any foreign prince, state, or country, or any person or company of persons, or any body corporate and politic, or body in the nature of a body politic and corporate as aforesaid, then every person so offending shall be deemed and taken to be guilty of felony, and being thereof lawfully convicted, shall be transported for any term of years not exceeding fourteen years.”

The statute 45 Geo. 3. c. 89. s. 1. reciting that by the 2 Geo. 2. c. 25. the 7 Geo. 2. c. 22. and other acts certain provisions were made for the preventing and punishing the forgery of notes, bills, instruments, &c. in those acts respectively mentioned; and that it was expedient that such provisions should extend and be in force in every part of Great Britain, with such alterations and amendments therein as were thereby made, enacts, “that if any person or persons shall falsely make, forge, counterfeit, or alter, or cause or procure to be falsely made, forged, counterfeited, or altered; or willingly act or assist in the false making, forging, counterfeiting, or altering any deed, will, testament, bond, writing obligatory, bill of exchange, promissory note for payment of money, indorsement or assignment of any bill of exchange or promissory note for payment of money, acceptance of any bill of exchange, or any acquittance or receipt, either for money or goods, or any accountable receipt for any note, bill, or other security for payment of money, or any warrant, or order for payment of money or delivery of goods, with intention to defraud any person or persons, body or bodies politic or corporate whatsoever; or shall offer, dispose of, or put away any false, forged, counterfeited, or altered deed, will, testament, bond, writing obligatory, bill of exchange, promissory note for payment of money, indorsement or assignment of any bill of exchange or promissory note for payment of money, acceptance of any bill of exchange, acquittance, or receipt, either for money or goods, accountable receipt for any note, bill, or other security for payment of money, warrant or order for payment of money, or delivery of goods, *with intention to defraud any person or persons*, body or bodies politic or corporate, knowing the same to be false, forged, counterfeited, or altered,” then every person or persons so offending shall be deemed guilty of felony without benefit of clergy.

45 Geo. 3. c. 89. s. 1. extends the 2 Geo. 2. c. 25. and 7 Geo. 2. c. 22. to every part of Great Britain with certain alterations and amendments.

Upon an indictment for forging a will, the probate of that will unrepealed is not conclusive evidence of its validity, so as to be a bar to the prosecution. (p)

Several questions have arisen as to the written instruments which may be considered as *deeds, bills of exchange, promissory notes, indorsements, &c.*; or as *receipts*; or as *warrants or orders for the payment of money or delivery of goods*.

Questions upon these statutes.

A power of attorney has been holden to be a *deed* within the meaning of the statute 2 Geo. 2. c. 25. s. 1. And in the same

Power of attorney is a deed.

case it was also decided, that forging a deed is within this statute, though the directory provisions of subsequent statutes have directed, that instruments for the purpose for which the forged deed was intended shall be in a particular form, or shall comply with certain requisites, and the forged deed is not in that form, nor has been made in compliance with those requisites; for the directory provisions do not make the deed wholly void in consequence of its not being in the form prescribed, and not having such requisites. (q) In a subsequent case it was also holden, after very ingenious and learned argument, that a power of attorney to transfer government stock, signed, sealed, and delivered, was a deed within this statute of 2 Geo. 2. c. 25. (r)

Uttering
Scotch notes
in England.

It may be observed, that the question whether uttering in England a promissory note of a Scotch bank, or chartered Scotch company, payable in *Scotland*, is made felony by statute, (s) appears to be set at rest by the 45 Geo. 3. c. 89. s. 8. which enacts, that all and every the clauses and provisions in this act contained shall extend "to every part of Great Britain."

In the following case it was holden, that a promissory note for the payment of a guinea in cash or *Bank of England* note was not within the statute 2 Geo. 2. c. 25.

Wilcock's
case.
A promissory
note for the
payment of
one guinea in
cash or *Bank
of England*
note holden not
to be within
the statute 2
Geo. 2. c. 25.

The prisoner, Daniel Wilcock, was tried on an indictment charging him in the first count with forging, and in another count with uttering knowing it to be forged, a certain promissory note for the payment of money, the tenor of which was as follows, *vis.*

Pontefract Bank, 1st April, 1807.

I promise to pay the bearer one guinea on demand here in cash or Bank of England note.

No. C^c. 591.

No. C^c. 591.

Entd. J. U.

ONE GUINEA.

For Perfect, Seaton, & Co.

JOHN SEATON.

with intent to defraud John Garside. There were two other similar counts, charging the intent to be to defraud John Seaton, John Fox Seaton, and Richard Seaton, the bankers. The jury found

(q) *Rex v. T. R. Lyon, Russ. & Ry.* 255.

(r) *Rex v. Fauntleroy, Ry. & Mood.* Cr. Cas. 52. And see *Rex v. Waite, ante*, 377.

(s) This question was raised in Dick's case, 1 Leach 68. 2 East. P. C. c. 10. s. 35. p. 925. where the prisoner was indicted for uttering a forged Scotch bank note, and the Judges were divided in opinion whether such a note were within the meaning of the statute 2 Geo. 2. c. 25. and whether the uttering it in England were felony; the statute 2 Geo. 2. c. 25. s. 4. providing that nothing in the act contained should extend to that part of Great Britain called *Scotland*. And also in *M'Kay's case*, O. B. 1803, MS. and *Russ. & Ry.* 71. where the pri-

soner was indicted for uttering a promissory note of the British linen company at Edinburgh; and the objection was taken on his behalf, that the instrument set out in the indictment, purporting to be an undertaking for the payment of money by a chartered Scotch company, only entitled the party to obtain payment in Scotland, and could not be put in suit in this country, and was not within the statute 2 Geo. 2. c. 25. in consequence of the operation of the fourth section. Dick's case, and the opinion of the Court, concerning the legality of contracts, in *Robinson v. Bland*, 2 Burr. 1078, were referred to; and, the point being submitted to the consideration of the twelve Judges, the prisoner was recommended for a pardon.

the prisoner guilty of uttering the note, knowing it to be forged : but the learned Judge respited the sentence, in order to take the opinion of the twelve Judges on the question, whether this was a note for the payment of *money* within the statute 2 Geo. 2. c. 25. the guinea being by the terms of the note to be paid in cash or Bank of England note at the option of the payer. And it is understood, that the Judges were of opinion that the conviction was wrong.(t)

In the following case a point was made whether the instrument in question could be considered as a *bill of exchange* within 2 Geo. 2. c. 25.

The prisoner, Josiah Chisholm, was convicted for forging a certain bill of exchange in the following form.

Chisholm's case. A bill drawn upon the commissioners of the navy holden to be a bill of exchange within the 2 Geo. 2. c. 25.

3d Rate, Robert Gore.		Entered 13 th day of May, 1814.		
		£ s. d.		
Full pay from 13th day of May, 1814,	}	25	4	0
to the 4th day of August, 1814,				
Amount of deductions,		2	17	3
Net Pay		£22	6	9

Gentlemen,

8th day of August, 1814.

Ten days after sight,

Please to pay to Mrs. Elizth. Coall, or order, the sum of twenty-two pounds six shillings and ninepence, being the net personal pay due to me, as acts. Lieutenant of his majesty's ship *Zealous*, between thirteenth day of May, 1814, and fourth day of August, 1814; for value received.

ROBT. GORE.

Approved,

T. BOYS, Captain of H. M. S. *Zealous*.

To the Commissioners of His Majesty's Navy.

London.

with intent to defraud Elizabeth Coall widow, against the statute, &c. The second count of the indictment was for uttering, &c. with the like intention: and the third and fourth counts were similar; only laying the intention to be to defraud his majesty. There were four other counts framed upon the statute 35 Geo. 3. c. 94. s. 3. and 34.,(u) but the counsel for the prosecution had admitted that those counts could not be supported; and they contended that the instrument was a bill of exchange within the 2 Geo. 2. c. 25. It was urged, on behalf of the prisoner, that it

(t) Wilcock's case, *cor.* Le Blanc, J., *Yorkshire*, Lent Ass. 1808, MS. And see Harrison's case, 1 Leach 180. 2 East. P. C. c. 19. s. 36. p. 926. *post.* 463, where an objection that certain counts of the indictment were not within the statutes 2 Geo. 2. c. 25. and 31 Geo. 2. c. 22. s. 78. because those

statutes were confined to the forgery of receipts for *money* or *goods*, whereas the counts in question charged the forgery of a receipt for *bank notes*, which were neither money nor goods, was allowed.

(u) *Ante*, 436, note (h).

appeared clearly, that the instrument was intended to be a bill under the 35 Geo. 3. c. 94. s. 3.; that it was not drawn to be presented for acceptance or payment by the commissioners of the navy, as a bill of exchange; but in order to procure an assignment of it according to the fifteenth section of that statute; that it was not a bill of exchange, because it was not drawn on any persons bound to accept or pay it; and that the commissioners of the navy were removable at pleasure, and might be changed between the drawing and presenting of the bill. On the other hand it was contended, that the intention with which this instrument was made was not material; and that it was not necessary, to constitute a bill of exchange for this purpose, that the parties on whom it was drawn should be liable to accept, or even be existing persons; and that it was enough if the instrument purported to be drawn on a person or persons to whom it might be presented. The learned Judge respited the sentence in order that the question might be submitted to the consideration of the Judges, whether this instrument was properly described as a bill of exchange. And the Judges were of opinion, that the conviction was right; that the instrument set forth in the case, was in form a bill of exchange; and that the statute 35 Geo. 3. c. 94. did not prevent its being so considered. (x)

One of the questions raised in a case which occurred about the same time appears to have been, whether a false assertion in an indorsement that the indorser has a procuration, without any other circumstance of falsehood or misrepresentation would make such an indorsement a forgery, within the statutes.

Maddocks' case.
As to the question whether a false assertion in an indorsement, that the indorser has a *procuration*, without any other circumstance of falsehood or misrepresentation, will make such an indorsement a forgery within the statute.

The indictment against the prisoner, George Maddocks, stated in the first count, that he had in his custody a bank bill of exchange (the tenor of which was set out) dated 1st October, 1814, for payment of 36*l.* 19*s.* 0*d.* at 7 days' sight to Messrs. S. Brown and Co. or order, accepted on said 1st October, the date of the bill. It also stated that there were two indorsements upon the bill; the first by the said Samuel Brown and Co. to Joseph Seymour or order, and the other by the said Joseph Seymour to Robert Falcon, or order; and charged that the prisoner, having this bill so indorsed in his custody, forged another indorsement upon it as follows:—

P. Pro^a. for Robert Falcon, GEORGE MADDOCKS.

with intent to defraud the Bank, against the statute, &c. The second count charged the prisoner with disposing of and putting away the forged instrument; and there were many other counts all charging the forgery to be of an indorsement. It appeared upon the evidence, that the prisoner was in the situation of a clerk and servant to the prosecutor, Mr. Robert Falcon, who was an attorney, having chambers in the Temple; that he was left in charge of the chambers, when the prosecutor went out of town, with instructions to receive any money, and make advances in the way of

(x) Chisholm's case, *cor.* Dampier, J., *Essex*, Spr. Ass. 1815, MS., and Russ. & Ry. 297.

business, and to open any letters, and do what was necessary in case a writ or any thing of that sort was wanted; but that he had no authority from the prosecutor to indorse any bill for him by procuration. During the absence of the prosecutor, Mr. Seymour, then the holder of the bill, indorsed it to the prosecutor, and sent it in a letter to his chambers. The prisoner opened the letter, and a day or two afterwards took the bill to the Bank, and received the money; having first made the indorsement charged by the indictment to be forged. At the time he received the money he wrote a receipt immediately under the forged indorsement in the words;—Received for Robert Falcon, 4 Elm Court Temple, 5 January, 1815, Geo. Maddocks. On the following day the 6th January, the prisoner wrote to the prosecutor a sort of journal of the week's occurrences, and therein mentioned the bill in question; but only stated that he had taken it for acceptance, though he had in fact received the money the day before. On the 9th January, the prosecutor returned to town, but did not find the prisoner at his chambers, he having previously absconded. In his defence, the prisoner said that he received the money for his master's use; and did not intend to apply it otherwise; and he assigned as the cause of his absenting himself some unexpected distress in his circumstances. The case was left by the learned Judge to the jury to consider, whether, under the circumstances in evidence, it appeared to them that the prisoner meant only to receive the money for his master's use; and acted under a supposition that, in the situation of trust in which he was placed, he had a right to describe himself as acting by procuration; or whether he had made the indorsement and received the money for the purpose of defrauding his master or the Bank. The jury were of opinion that it was for the purpose of fraud, and referred to the prisoner's letter of the 6th January, wherein he only speaks of having taken the bill for acceptance, though he had actually received the money for it the day before; and they accordingly found him guilty. But as it did not appear, that the prisoner had offered to make use of the indorsement to transfer the bill to any other person, or to enable himself to receive the contents as holder, or bearer, having on the contrary given the receipt in his own name for the use of his master, whose place of residence was truly described in the receipt; a doubt arose whether the indorsement was such an assignment of the bill as is meant by the word "indorsement," in the statute. And upon this doubt the sentence was respited, in order to take the opinion of the Judges, whether the prisoner ought to have been acquitted, either on the special circumstances of his conduct, or upon the more general question, whether a false assertion in an indorsement, that the indorser has a procuration, without any other circumstance of falsehood or misrepresentation, makes such an indorsement a forgery within the statute. The case was argued at great length before the twelve Judges: but no opinion was ever delivered; the prisoner dying in Newgate, previously to the subsequent sessions at the Old Bailey.(y)

(y) Maddocks's case, O. B. Oct. 1815, and argued before the Judges in Mich. T. 1815, MS.

Box's case.
A promissory note may be a valid note within the statute 2 Geo. 2. c. 25. and the subject of forgery, though not negotiable.

It is not necessary that a promissory note should be in itself *negotiable*, in order to make it such a note as may be the subject of an indictment for forgery, within the statute 2 Geo. 2. c. 25. This was holden in a case where the prisoner had been convicted on an indictment which charged him with having forged, &c. a certain promissory note for the payment of money, which was as follows :—

“ On demand we promise to pay Messdames Sarah Wallis and Sarah Doubtfire, stewardesses for the time being of the Provident Daughters' Society, held at Mr. Pope's, the Hope, Smithfield, or their successors in office, sixty-four pounds, with 5 per cent. interest for the same ; value received, this 7th day of February, 1815.

“ For Felix Calvert and Co.

£64.

“ JOHN FORSTER.”

It was moved, in arrest of judgment, that this was no promissory note ; and the case was argued before the twelve Judges. Their opinion was afterwards delivered by Le Blanc, J., to the following effect :—“ An objection was taken in arrest of judgment, and argued before all the Judges, that the instrument in question, “ such as it is stated in the indictment, was not a promissory note within the statute, so as to be the subject of an indictment for forging, or uttering it, knowing it to be forged. The objection to this instrument was founded on this circumstance, “ that it appears to be made payable to two ladies, describing “ them as stewardesses of a provident society, or their successors in office ; and that, this society not being enrolled according to the statute, this note was not capable to enure to their successors, and was not negotiable. The Judges are of opinion that “ this is, as stated on the indictment, a valid promissory note “ within the statute of Geo. 2. It is not necessary that such a “ note should be in itself negotiable ; it is sufficient that it should “ be a note for the certain payment of a sum of money, whether “ negotiable or not. And though these ladies were not at the “ time legally stewardesses, yet it was a description by which “ they were known at the time ; and though they could not legally have successors in office, yet, in case of their decease, “ their executors and administrators might sue, and they themselves, during their life, might recover on it. Therefore, it is “ an instrument capable of being the subject of forgery, and there “ is no ground to arrest the judgment ; and the Judges are all of “ opinion that the conviction is right.” (s)

Birkett's case.
Forging a bill payable to the prisoner's own order, and uttering it without indorsement as a security for a debt, held to be a complete offence.

Forging a bill payable to the prisoner's own order, and uttering it without indorsement, as a security for a debt, was holden to be a complete offence. The count in the indictment more peculiarly applicable to the facts of the case charged that the prisoner having in his possession a paper whereon was written or printed to the following tenor :—

(s) *Rex v. Box*, 1815. 6 Taunt. 325. Russ. & Ry. 300.

No. 28.

£
Preston Bank,

1804.

Pay to the order of
value received.ATHERTON, GREAVES, and DENISON.
To JOSEPH DENISON, Esq. and Co., London.
Entd.

did forge, &c. in and upon the said paper as follows:—"2310"—
"35 : 3 : 5"—"16 August"—"Two months after date"—"Mr.
"John Birkett, thirty-five pounds 3 : 5"—"R. N."—and by that
means did forge, &c. a bill of exchange as follows:—

No. 28.

£35 : 3 : 5.

2310.

Preston Bank, 16 August, 1804.

Two months after date pay to the order of Mr. John Birkett
thirty-five pounds 3 : 5, value received.ATHERTON, GREAVES, and DENISON.
To JOSEPH DENISON, Esq. and Co., London.
Entd. R. N.

with intent to defraud Atherton, Greaves, &c. Other counts
charged an uttering, &c.; and others an intent to defraud different
persons, and amongst others, one Matthew Yates.

By the evidence of the wife of Matthew Yates, the person
mentioned in the indictment, it appeared that her husband re-
sided at Liverpool and kept an inn there, to which the prisoner
came on the 14th of the preceding August, with a horse, and con-
tinued boarding and lodging there until the 27th of the same
month. Four or five days before the 27th, a person came to the
inn and took away the horse, and the witness then directed the
waiter to carry the prisoner his bill; after which the prisoner
came to her and gave her the bill of exchange, filled up as stated
in the indictment, saying he hoped that would satisfy her for
what he had had; to which she answered, "I dare say it will;"
and took it from him and kept it until the 27th of August, when
the prisoner was apprehended.

Upon cross-examination, the witness said that the prisoner did
not give the bill of exchange to her as payment; and that she
knew she could make no use of the bill until the prisoner indorsed
it; that he told her he did not wish to discount it, and would pay
her in a few days without it. She further stated that she con-
sidered herself as keeping the bill for the prisoner, and not for her-
self.

It was further proved, that the prisoner had been a clerk in the
house of Atherton and Co. from July, 1803, to July, 1804, and
that it had been usual in that house to have cheques signed
"Atherton, Greaves, and Denison" kept in a drawer within the
proper custody of two superior clerks, but accessible to the pri-
soner, who was sometimes permitted to sign them. It was also
proved, that the whole of the written part of the bill of exchange

stated in the indictment, except the signature "Atherton, Greaves, and Denison," was in the handwriting of the prisoner.

The learned Judge left the case to the jury, telling them that the use made of the instrument when filled up by the prisoner, though not indorsed, was conclusive evidence of the fraudulent intention, and proved as well the counts charging the actual forgery, as those which charged the uttering, &c., knowing it to have been forged; and the jury returned a verdict of guilty. But the learned Judge afterwards respited the sentence, doubting whether he ought not to have left the question of fraudulent intention more open to the jury; in which case they might have found that the prisoner did not mean to defraud any person, but, by paying his reckoning and taking back the bill, to make no further use of it.

The case was taken into consideration at a meeting of all the Judges in Easter term, 11th May, 1805, when they were of opinion, that the facts stated amounted to forgery, and with a fraudulent intent; the bill having been given to the landlady to obtain credit, though as a pledge only.^(a)

We may now shortly consider the questions which have arisen as to the instruments which may be considered as *receipts* within the statutes.

Cases as to
"receipts."

Testick's case.
"Received
the contents
above, by
me, S. W.,
&c." is a
sufficient
statement of
the receipt in
the indictment,
without setting
forth the bill of
items to which
it referred.

In a case where the prisoner was indicted for uttering a forged "receipt for money," in the following words, "Received the contents above, by me, Stephen Withers;" it appeared in evidence that he was employed by a person who kept a lottery-office, to carry out the prize-money, with an account of the deductions, and to pay it to the party, and bring back his receipt; and that the following account was delivered to him, with money to pay the balance—

No. 38,811.

	MR. WITHERS,	£.	s.	d.
One 16th of a 20l. prize	-	1	5	0
Deduct for expences advances and remitting money to you	-	0	1	0
		<hr/>		
		1	4	0

That upon producing this account again, when he settled his accounts with his employer, the receipt stated in the indictment was at the bottom of it; and that he had not paid the money to Mr. Withers, whose handwriting had been forged. It was objected on behalf of the prisoner, that this receipt did not correspond with the indictment; for nothing was set forth but the receipt as for *the contents above*: and that, together with the bill of particulars, was one entire thing; and it being set forth, "which said false receipt, &c. is as follows," the whole ought to have been set forth, and not part only, namely, "*the contents above*," which did not appear to be the same, nor to be a receipt for money. And it was also urged after conviction, in arrest of judg-

(a) *Rex v. Birkett*, Russ. & Ry. 86.

ment, that it did not appear by the receipt set out in the indictment that it was a *receipt for money*, or what it was for; and that being only for *the contents above*, and nothing set forth to shew what they were, or explain the receipt, it was unintelligible. The Judges were of opinion that the indictment was sufficient, for it was, "*Received the contents above*," which shewed it to be a receipt for something, though the particulars were not expressed; and it was laid to be a forged *receipt for money*, under the hand of Stephen Withers, for 1*l.* 4*s.*; and the bill itself was only evidence of the fact, and shewed it to be a receipt *for money* as charged. (b)

It has been admitted that bank notes are not considered as *money or goods*, within the statute 2 Geo. 2. c. 25. But it appears to have been holden, in the same case, that an entry of the receipt of money or notes made by a cashier of the Bank of England, in the bank-book of a creditor, is an *accountable receipt* for the payment of money within the statute 7 Geo. 2. c. 22.

The indictment against the prisoner, John Harrison, contained a great number of counts: one set framed on the statutes 2 Geo. 2. c. 25. and 31 Geo. 2. c. 22. s. 78., charging the prisoner with forging and uttering a certain *receipt for money*, viz. "1777, June 16, Bank notes, C. £3210," with intent respectively to defraud the Bank of England and the London Assurance Company; the other set framed on the statute 7 Geo. 2. c. 22., charging the prisoner with altering and uttering a certain *accountable receipt for bank notes for payment of money*, (setting it out as before,) viz. "the said sum of 210*l.*," by prefixing the figure 3 to the said figures and cypher 210*l.*, whereby the words, &c. "1777, June 16, Bank notes, C. £210," together with the figure 3, imported that J. C., a clerk of the Bank of England, had received bank notes to the amount of 3210*l.* with the like intent. Upon the evidence, it appeared that the London Assurance Company, to whom the prisoner was accomptant, kept their cash with the Bank of England; for which purpose the Bank furnished the London Assurance with a book, the title of which was "Debtor, the Bank of England with the London Assurance, Creditor." On the debtor side, the clerk of the Bank, when any money or bank note was sent to him, entered the date, and what it was that was paid in; then he signed his name, and afterwards wrote the sum, putting a bar or dash before the figures, in order to prevent another figure being prefixed or subjoined: and when the London Assurance sent for money, the cashier of the Bank *wrote off* so much from their bank-book; which bank-book was kept by the prisoner, as accomptant to the company, and sent by him to the Bank as occasion required. On the 16th June, 1777, the company paid into the Bank the sum of 210*l.*, which was received by a clerk of the name of *John Clifford*, who made an entry in the book as follows, "1777, June 16, *Bank notes*, C. 210*l.*," to which sum the prisoner prefixed the figure 3, making thereby the sum received appear to have been 3210*l.* The fact of prefixing the figure, in the manner charged in the indictment, having been

Harrison's case. A forged receipt for bank notes is not a receipt for money or goods, within the statute 2 Geo. 2. c. 25. But an entry of the receipt of money or notes, made by a cashier of the Bank of England, in the bank-book of a creditor, is an *accountable receipt* for the payment of money within the 7 Geo. 2. c. 22.

(b) Testick's case, 1774. 2 East. P. C. c. 19. s. 36. p. 925.

brought home to the prisoner, it was first objected that the case was not within the first set of counts, which were framed on the statutes 2 Geo. 2. and 31 Geo. 2., those statutes being confined to receipts for money or goods, and this being a receipt for *bank notes*, which were neither money nor goods; and that the legislature had so thought, by passing the stat. 7 Geo. 2., in which *bills, notes, &c.* are particularly mentioned. And this objection was allowed. But the prisoner was convicted on the second set of counts, framed on the statute 7 Geo. 2. c. 22.: and two points were reserved for the consideration of the Judges; first, whether the entry made by the cashier in the bank-book could be considered as an accountable receipt for the payment of money within that statute; and, secondly, that the intent to defraud a *corporation*, (the Bank of England, and the London Assurance Company, being the corporations stated in the indictment,) was not within the statute; which was confined to forgeries committed with intent to defraud any *person*. It is said that the Judges were clearly of opinion on the first point that an entry in a bank-book is an *accountable receipt* within the meaning of the act. But no opinion was publicly given; and the matter became unimportant in the particular case, as the Judges decided the second point in favour of the prisoner, and he was discharged.(c)

Hunter's case. The mere signing certain names to an assignment for payment of a sum in a navy-bill, does not, unless connected with other facts, purport on the face of the writing to be a receipt; and it should, therefore, be averred that the navy-bill, &c. together with the signatures, did purport to be and was a receipt.

In the following case the point arose as to the necessary averments in the indictment of the instrument in question purporting to be and being a receipt, where it did not necessarily purport to be such on the face of it. The indictment charged that the prisoner had in his possession a certain navy-bill, (which was set forth according to its tenor and effect,) under which navy-bill there was contained a certain order in writing for payment, called an assignment, &c. and upon which there was contained a certain indorsement, partly printed and partly written, by one Wm. Davis, chief clerk to the comptroller of his majesty's navy, in his office, for bills and accounts, to the following tenor and effect; "The certificate within mentioned is indorsed by Edward Wilson, payable to Mr. Wm. Thornton; T. Davis:" and that the prisoner forged, &c. a certain receipt for money; to wit for the sum of 25*l.* mentioned and contained in the said paper, &c. called a navy-bill, which forged receipt was as follows; that is to say, "Wm. Thornton," "Wm. Hunter:" with intention to defraud the king against the form of the statute, &c. A second count stated the

(c) Harrison's case, 1777. 1 Leach 180. 2 East. P. C. c. 19. s. 36. p. 926. In the last authority the point respecting the *accountable receipt* is not reported; but it is referred to as being stated in 1 Leach: and it is observed that, in a subsequent case, (Lyon's case, 2 East. P. C. c. 19. s. 36. p. 934.) Grose, J., alluded to the ground upon which this point was decided, and said, "That in *Rex v. Harrison*, the book in which the entry was made imported to be a book containing receipts for money received by the

Bank from their customers, and therefore shewed that the money was received from the party to whom the book belonged." Mr. East also observes, that it does not appear whether the opinion of the Judges upon this point was formed with reference to the manner in which the offence was laid in the indictment. The defect upon which the Judges decided in favour of the prisoner was removed by the statute 18 Geo. 3. c. 18. *Ante* 454.

navy-bill, the order for payment and indorsement, as in the first count; and then stated, that to the said last-mentioned navy-bill, was annexed and written a certain false, forged, &c. receipt for money, to wit, for the sum of 25*l.*, in the said last-mentioned paper, called a navy-bill; which said false, forged, &c. receipt for money was as follows, that is to say, "Wm. Thornton," "Wm. Hunter;" and that the prisoner knowingly uttered the said last-mentioned forged, &c. receipt for money, with intent to defraud the king. Other counts, nearly similar, charged the instrument forged to be an *acquittance*; and some of the counts stated the intention to be to defraud Wm. Thornton and other persons. Upon the evidence, it appeared that Edward Wilson, who had been pilot of the Lord Mulgrave, having received from his captain a certificate of his service, sent it to Wm. Thornton, to receive his wages. That the prisoner was a clerk in the comptroller's office; and, being employed to forward the pilot's bill through the office, got into his hands the bill stated in the indictment, and carried it with the order for payment and indorsement upon it, which were necessary for receiving the money, to the cashier of the pay-office; having wafered to one side of the bill, on which was written the sum 25*l.*, under those figures, a fourpenny stamp used for receipts, on which were written the names of "Wm. Thornton," "Wm. Hunter," without any words importing that they had received the money. And it was proved that the cashier was in the habit of paying navy-bills on the owner's name being written under the sum, without any other receipt. It appeared, on producing the bill, that the name Major Woolhead was written at the bottom of it; with respect to which it was proved that it was usual to have his name to the bills, as without it they did not regularly pass through the office; but that a bill would not be stopped if his name were not put to it. There also appeared on one side of the bill the initials of Mr. Davis's name, T. D. which were not stated in the indictment. The prisoner having been convicted, judgment was respited, to take the opinion of the twelve Judges on the case; and it was argued before them that the indictment was defective upon several grounds: and, amongst others, first because it did not appear, by the tenor of the instrument as set forth therein, that it was a receipt; and, secondly, because there was nothing stated in the indictment to shew that this could operate as an *acquittance*. And judgment was arrested, on the ground that it did not appear on the face of the indictment, nor was it shewn by averment, that the instrument was a receipt. Grose, J., in delivering the opinion of the Judges, said, "That it was not enough to call the signature of the two names, 'Wm. Thornton,' and 'Wm. Hunter,' a receipt, for they did not standing by themselves, purport to be a receipt; and, therefore, the indictment should have averred that the said names, 'Wm. Thornton,' and 'Wm. Hunter,' written on the said paper, imported and signified that the said *Wm. Thornton* and *Wm. Hunter* had received the sum of twenty-five pounds mentioned in the said paper writing. This is undoubtedly the law upon this subject; therefore, as the words 'Wm. Thornton, Wm. Hunter,' do not import to be a receipt, and there being nothing to explain the import of

"these words, or to shew that they were in any way intended to signify that those persons had received the money, this indictment is clearly bad on the first count; and, as the same objection applies in substance to the second count, though it is different in point of form, the majority of the Judges are of opinion that the judgment ought to be arrested." (d)

Thompson's case. The indictment for forging the word "*Settled*," at the bottom of a bill, must shew, by proper averments, that it is a receipt.

Upon the authority of the foregoing case, it was holden that an indictment for forging the word "*settled*," at the bottom of a bill of parcels, must shew by proper averments that it is a receipt. The indictment charged that the prisoner did forge, &c. a certain receipt for money, to wit, for the sum of one pound, one shilling, and sixpence; which said false, forged, and counterfeited receipt for money, is as followeth—that is to say, "*Settled, J. M.*" Other counts called it an *acquittance*. It was objected on behalf of the prisoner, that the indictment should have shewn, by proper averments, that this was a receipt for money, according to the determination in Hunter's case. On the part of the prosecution, it was contended that it did purport to be a receipt made by a person who had a right to demand money, that the evidence proved that the right arose from the sale and delivery of goods according to the bill; and that it was sufficient if the instrument appeared upon the evidence to be of the description stated in the indictment: and Testick's case was cited. (e) And it was further contended that, as the stamp act, (25 Geo. 3. c. 55. s. 7.) had enacted that every note, memorandum, &c. signifying or denoting any debt, account, or demand being paid, *settled*, &c. should be deemed and taken to be a receipt within the meaning of the act, the necessity of averring such an instrument as the present to be a receipt was taken away. But the Court held, on the authority of Hunter's case, that the indictment was defective. (f)

Lyon's case. A scrip receipt, not filled up with the subscriber's name, is not a receipt for money within the statutes.

It has been holden that a scrip receipt, not filled up with the name of the subscriber or person from whom the money was received, is not a receipt for money within the statutes. The point came on for consideration upon demurrer; and after argument, Grose, J., delivered the opinion of the Judges; and said that the instrument, the tenor of which was necessarily set forth in the indictment, was not a receipt for money in contemplation of law, within the meaning of the statute 2 Geo. 2. c. 25, &c. That it was the duty of the cashier appointed by the Bank to receive such subscriptions to fill up the receipts with the names of the subscribers, or persons from whom they originally received the money; and, until the blank left in the printed form was so filled up, the instrument did not become an acknowledgment of payment: or, in other

(d) Hunter's case, 1794. 2 Leach 624. 2 East. P. C. c. 19. s. 36. p. 928; and see *ante*, 362. In 2 East. it is said that Buller, J., thought the second count might be supported, considering this to be as much a receipt as the writing a name was an indorsement on a bill of exchange; but to this it was answered, that an indorsement was complete by writing the name on the bill without

any thing more; whereas the name itself, as stated in the indictment, was no receipt; though the name coupled with the navy-bill, might together form a receipt. But then it ought to be so stated.

(e) *Ante*, 464.

(f) Thompson's case, *cor.* Thompson, B., and Graham, B., O. B., 1801. 2 Leach 910.

words, a *receipt* for money. While in such a state it was no more a receipt than if the sum professed to be received had been omitted.(g)

A memorandum importing that A. B. had paid a sum to C. D., but not importing any acknowledgment from C. D. of his having received it, was holden not to be a receipt within the statute.(h)

Where a person who was employed by the executors of a contractor with the navy board, to settle the account of the testator with government, produced certain forged *acquittances and receipts for money*, and delivered them to the navy board, in order to exonerate the estates of the testator from an extent, it was holden to be a forging and uttering, within the statute 2 Geo. 2. c. 25. The indictment charged the prisoner with forging and uttering, knowing, &c. a great many acquittances and receipts, (which were set forth,) with intent to defraud the king. It was objected by his counsel that the case was not within the statute 2 Geo. 2. c. 25., as the receipts in question purported to be receipts given to Collinridge, the contractor, by persons employed by him, for money therein stated to have been paid to them for work and materials done and provided for the business in which he was employed under the navy-board, and were produced by the prisoner as vouchers, to accompany and verify Collinridge's accounts, in order to get them passed by the navy-board; which accounts the prisoner had taken upon himself, after Collinridge's death, to get passed, in order to avoid an extent which had issued against Collinridge's estate and effects. And it was urged in support of the objection, that these workmen were solely employed by Collinridge, and not by the navy-board; and that he, and not the navy-board, were answerable to them. That, therefore, the board had nothing to do with these receipts; and it was indifferent to the board whether these sums had been paid to these several persons or not. The prisoner having been convicted, the case was submitted to the consideration of the twelve Judges, who all, (with the exception of Lawrence, J., who was absent,) held that the conviction was right, and that the receipts, as stated, were within the statute. Grose, J., in delivering their opinion, said, "The facts in the case prove that these receipts were forged; and that they purported to have been given to *Collinridge* by workmen for monies paid by him to them for work done *for the commissioners of the navy-board*. The persons, therefore, employed for that purpose by *him*, were employed not solely on his account, but on account of the king; and these receipts, if genuine, would have been legal vouchers for his account, and would have intitled him to a discharge from the navy-board. It is clear then, from the facts proved at the trial, and from the verdict of the jury, that these receipts are forged receipts, and that they were knowingly uttered by the prisoner with intent to defraud the king." (i)

Memorandum importing a payment, but not a receipt of the money.

Thomas's case; holden that, where a person who was employed by the executors of a contractor with the navy-board to settle the account of the testator with government, produced forged acquittances and receipts, which were in fact fabricated vouchers, in order to exonerate the estates of the testator from an extent; it was a forging and uttering, within the statute 2 Geo. 2. c. 25.

Forging a receipt in order to found a claim of payment thereon against a third person, is as much within the statute as forging it to defeat a claim by the person whose name is forged.

(g) Lyon's case, O. B. 1793. 2 Leach 597. 2 East. P. C. c. 19. s. 36. p. 933. And see several points as to the forgery of scrip receipts discussed in Reeve's case, 2 Leach 808. *et sequ.*

(h) Rex v. Harvey, Russ. & Ry.

227.

(i) Thomas's case, 1800. 2 Leach 877. 2 East. P. C. c. 19. s. 36. p. 934. And see Jones and Palmer's case, *ante*, 368.

As to the right of the prisoner to put the prosecutor to his election on an indictment stating various forgeries.

In the foregoing case a point arose, as to the right of the prisoner to put the prosecutor to his election, on an indictment stating various forgeries. The first count of the indictment charged that the prisoner uttered, &c. a certain forged acquittance and receipt for money (setting it forth), also a certain other forged acquittance and receipt for money, (also setting it forth) and stated in like manner above twenty other receipts of different dates, for different sums, and purporting to be signed by different persons, with intent to defraud the king. And before any witnesses had been examined the counsel for the prisoner submitted to the Court, whether the prosecutor ought not, under the circumstances of this case, to elect on which of the several receipts stated in the first count of the indictment he intended to proceed, and be restrained from proceeding on more than one of them; as, amidst such a variety, it would otherwise be almost impossible for the prisoner to conduct his defence. But Le Blanc, J., referred to the indictment, by which it appeared that all the receipts stated in the first count were charged to have been *uttered at one and the same time*; and as this single act of uttering the receipts would, if clearly proved, constitute only one offence of *uttering*, he refused the application. The proof was, that the several receipts stated in the indictment were uttered at the same time in one bundle, given by the prisoner to the solicitor of the navy-board. And when the case was submitted to the consideration of the twelve Judges, they were all of opinion that the application to put the prosecutor to his election was properly refused. (k)

Construction as to warrants or orders for the payment of money, or delivery of goods.

The statute is not confined to commercial transactions.

Bills of exchange, &c. may be laid as warrants, or orders for the payment of money.

It now remains to notice the cases which relate to the instruments which may be considered as *warrants or orders for the payment of money or delivery of goods*.

It appears at one time to have been contended that the statute was confined to commercial transactions; but several cases have decided that it is not so confined. (l)

It has been frequently holden, that instruments which in the commercial world have peculiar denominations may yet be laid as warrants, or orders for the payment of money; if they fall within those terms, and are such in effect. So that a bill of exchange may be laid as an order for payment of money; (m) and in one of the cases, where this point was considered by the Judges, they were unanimously of opinion, that it was well laid; and, it was observed, that every bill of exchange seemed to be an order for the payment of money, though not *vice versa*. (n) And in a sub-

(k) 2 Leach 882.

(l) Graham's case, O. B. 1778. 2 East. P. C. c. 19. s. 41. p. 945. M'Intosh's case, 1800. 2 East. P. C. c. 19. s. 39. p. 942.

(m) Locket's case, O. B. 1772. Trin. T. 1774. 1 Leach 94. 2 East. P. C. c. 19. s. 38. p. 940. The instrument was in the following form:—

London, Feb. 14, 1772.

Messrs. Neale, James, Fordyce, and Down.

Pay to Mr. William Hopwood or

bearer, sixteen pounds ten shillings and sixpence.

£16. 10. 6.

R. VERNER.

(n) Shepherd's case, O. B. 1781. Mich. T. 1781. 2 East. P. C. c. 19. s. 40. p. 944. 1 Leach 226. The instrument was as follows:—

Green-street, 31st July, 1781.

Sirs, Pray pay to Mr. John Atkins, or bearer, six pounds six shillings, value received, Yours, &c.

H. TURNER,

sequent case, the Judges all finally concurred in opinion, that a bill of exchange, or banker's draft, was well laid in the indictment as an order for payment of money; on the ground, that though it was a bill of exchange, it was also a warrant for the payment of money; it was, if genuine, a voucher to the bankers or drawees for the payment.(o)

In another case, the prisoner, James M'Intosh, was convicted of forging and uttering, knowing it to be forged, a certain order for the payment of money in the words and figures following:—

M'Intosh's case. Instrument considered as a bill of exchange, or order for payment of money.

“ *Petersfield, 6 August, 1799.*

“ Sir, Please to pay on demand to Mr. Hugh Young, or order, all my proportion of prize money, due to me for my services on board his Majesty's ship *Leander*, for which this shall be your authority. Witness my hand,

“ JOHN JOHNSON,

✕
his mark.

“ To Alexr. Davison, Esq.

“ No. 21, *Milbank-street, Westminster.*

“ Signed before us,

“ Walter Noble, Minister.

“ John Williams, } Church-

“ Francis Gibbons, } wardens.”

In two counts it was called an order for payment of money; and in two other counts a bill of exchange; and it was stated to have been forged and uttered, with intent to defraud John Johnson. Four other counts charged the offence to have been committed with intent to defraud Alexander Davison. One of the objections on the part of the prisoner was that this was not a bill of exchange, nor an order for payment of money within the statute 7 Geo. 2. c. 22. because no sum of money was mentioned, and it was not certain that any money would be due to Johnson. The point was referred to the consideration of the Judges, who held the conviction proper.(p)

In a case in which it appeared that the prisoner drew a bill, “ Please to pay the bearer on demand fifteen pounds, and account to your humble servant, Charles H. Ravenscroft.” which was his own name; but the bill was not addressed to any one; and it appeared that when the instrument was uttered, the following words and signature were forged upon it, “ Payable at Messrs. Masterman & Co. White Hart Court, Wm. M'Inerheny;” and

Ravenscroft's case. Not an order for the payment of money.

(o) Willoughby's case, *Warwick*
Lent Ass. 1783. East. T. 1783. 2
East. P. C. c. 19. s. 40. p. 944., *ante*,
230. The instrument was in this
form:—

London.

Pay 5 Gas. to Mr. Richd. Moore, or
bearer on demand, value received.

ROBT. COALES.

Reced. 5 Gas.

Entd. R. Moore.

POST BILL.

Birmingham, 13 Feby. 1783.

No. 6127,

Sir Wm. Lemon, Bt. & Co. Bankers,

(p) M'Intosh's case, 1800. 2 East,
P. C. c. 19. s. 39. p. 947.

it also appeared that M^rnerheny kept cash at Masterman & Co. who were bankers; a majority of the Judges held that this was not an order for payment of money, there being no special averments in the indictment that it was intended for an order, or that Masterman and Co. were bankers. (q)

The prisoner drew a forged bill upon the treasurer of the navy, and made it payable to blank or order, and signed it in the name of a navy surgeon. It was holden that such a direction to pay to blank or order was not sufficient, and that to constitute an order for payment of money, there must be some payee. (r)

The warrant or order must purport to have been made by one having authority to command payment, &c.

It is said, that it seems to be settled, that if the *warrant or order* mentioned in the stat. 7 Geo. 2. c. 22. do not purport on the face of it, or be shewn, by proper averments, to be made by one having authority to command the payment of the money or direct the delivery of the goods, and to be compulsory on the person having possession of the subject matter of it; but only purport to be a request to advance the money or supply the goods on the credit of the party applying, which the other may comply with, or not as he sees proper, it is not a warrant, or an order within the statute. (s)

Mitchell's case. A note to a shopkeeper, in the name of an overseer of the poor, holden not to be within the statute.

Thus it was holden, that a note in the name of an overseer of the poor to a shopkeeper, desiring him to let the prisoner have certain goods, which he would see him paid for, has been holden not to be a warrant or order for the delivery of goods within the statute. Nine of the Judges, on a conference, were clearly of opinion, that the writing was not a warrant or order for the delivery of goods within the act; considering that the words *warrant, or order*, as they stand in the act are synonymous, and import that the person giving such warrant or order has, or at least claims an interest in the money or goods which are the subject matter of it, and has or at least assumes to have a disposing power over them, and takes on him to transfer the property, or at least the custody of them to the person in whose favour such warrant or order is made. And though this case must fall within the mischief; yet, in the construction of an act so penal, the strict letter of it ought not to be departed from. (t)

Williams's case. A note to a tradesman requesting him to let the bearer have certain goods holden not to be within the statute.

So a note to a tradesman, requesting him to let the bearer have certain goods, has been holden not to be an order for the delivery of goods within the statute, it appearing that the person whose name was forged in the note, though a customer of the tradesman, was not the owner of, nor had any special interest in the goods in question, or any others in the tradesman's hands, nor had any authority to send any such order if it had been genuine. (u)

(q) *Rex v. Ravenscroft*, Russ. & Ry. 161.

(r) *Rex v. Richards*, Russ. & Ry. 193., and see *Rex v. Randall*, id. 195.

(s) 2 East. P. C. c. 19. s. 37. p. 936.

(t) *Mitchell's case*, Fost. 119. 2 East. P. C. c. 19. s. 37. p. 936.

(u) *Williams's case*, 1775. 1 Leach 114. 2 East. P. C. c. 19. s. 37. p. 937. The point was submitted to the consideration of the Judges, who all (De

Grey, C. J., and Willes, J., being absent) agreed that the case was not within the statute, feeling themselves bound by the authority of *Mitchell's case*, (note (t)); but most of them said they should have doubted the propriety of that determination, if it had been *res integra*; but as it had been so long acquiesced in they thought it could not be departed from. And accordingly in a subsequent case,

Upon similar grounds it was ruled, in a recent case, by a very learned Judge, that a forged order for the purpose of obtaining a reward for the apprehension, &c. of a vagrant, was not a forgery within the statute, unless it contained the requisites prescribed by the vagrant act, 17 Geo. 2. c. 5. s. 5., now repealed. It appeared, that the order was deficient in the requisites described by that act, inasmuch as it did not purport to be under seal, and it was not directed to the high constable of the Riding: and it was contended, on behalf of the prisoner, that such an instrument, supposing it to have been genuine, would have been perfectly inoperative; that it was nothing more than an order by a magistrate on the county treasurer, for the payment of a sum of money, over which the magistrate had no controul or dominion whatsoever, except by means of the statute 17 Geo. 2. On the part of the prosecution, it was contended principally, that since orders in the form of the order in question had been generally drawn and acted upon in the Riding of the county in which this offence was committed, it was not essential, to bring the prisoner within the statute, that the order should comply with the requisites of the 17 Geo. 2. c. 5.; and, that it was sufficient that it pursued the usual form, being thereby capable of being the instrument of fraud. But Bayley, J., said, "To bring the case within the statute, the order must be such as, "on the face of it, imports to be made by a person who has a disposing power over the funds. In this case, the party looking at the act must have known that the order was not made by one who had a disposing power over the funds in his hands. The magistrate, as an individual, had no right to make such an order, and the treasurer had no right to consider it as an order which he was bound to obey. The magistrate, in his character of a justice of the peace, had no authority to make such an order; if he had any it was derived from the statute, but he had no power to make such an order as this, and if such a one had been made, the treasurer ought not to have obeyed it.(x)

Rushworth's case. A forged order, for the purpose of obtaining a reward for the apprehension of a vagrant, holden not to be within the statute; it being deficient in the requisites prescribed by the statute which authorises it to be made.

a note in the following form, "Messrs. Songer, please to send 10*l.* by the bearer, as I am so ill, I cannot wait "on you, Eliz. Wery;" was holden not to be an order within the statute. *Ellor's case*, O. B. 1784. 2 East. P. C. c. 19. s. 37. p. 938. 1 Leach 323. The prisoner was, therefore, acquitted of the felony; but detained, and at a subsequent sessions convicted of the misdemeanor. 1 Leach 323.

(s) *Rushworth's case*, *cor. Bayley, J.*, *York Sum. Ass.* 1816. *Russ. & Ry.* 317. The prisoner was accordingly acquitted upon that and another similar indictment. In *Graham's case*, O. B. Oct. 1778. 2 East. P. C. c. 19. s. 41. p. 945. *ante*, 468, note (l), the prisoner was indicted for a similar offence, and an objection taken on his behalf was, that the eighteenth section of the 17 Geo. 2. c. 5. expressly subjected the party forging such an

order to a penalty of 50*l.* which must be considered as a repeal of the statute, 7 Geo. 2. c. 22. as to orders of this description. And it is observed in 2 East. (*sub. sup.*) that this objection seems to have been entitled to a different consideration from what it is stated to have received; as the prisoner was, notwithstanding, convicted, and received judgment. And a *qu.* is made, as to what became of the case. It should, however, be observed, that this eighteenth section of the 17 Geo. 2. c. 5. enacted, that "in case any "such petty constable or other officer "or governor or master of any house "of correction, shall counterfeit any "such certificate receipt or note, or "make or knowingly permit to be "made any alteration in any such "certificate, receipt, or note, he shall "forfeit the sum of fifty pounds;" and that it does not appear from the

The same prisoner was tried and convicted at the same assizes for *presenting* the same order to the treasurer of the county pretending it was genuine, and obtaining from the said treasurer under such order the sum of 4*l.* 10*s.* 6*d.* The indictment after charging that the prisoner, with intent to cheat, &c., the treasurer, presented the order, and that he knowingly, &c. pretended that it was a genuine order, proceeded, "And so the jurors, &c. say, that the prisoner on the day and year, &c. did obtain the said sum of 4*l.* 10*s.* 6*d.*;" but the intent to cheat and defraud the said treasurer was not stated in this part of the indictment, nor was the obtaining charged to have been effected knowingly and designedly. And upon a case reserved the Judges held the indictment bad. (y)

Froud's case.
Order upon
the treasurer
of a county.

By the 48 Geo. 3. c. 75., a justice of the peace may order the treasurer of the county to pay every churchwarden, overseer, headborough, or constable, the expences he has incurred in burying any dead body that has been cast on shore. A justice's order was forged, stating that a dead body had been cast on shore in the parish of A., that I. S. had made oath before the justice that he had laid out 3*l.* 5*s.* in the burying such body and requiring the treasurer to pay him that sum. The indictment was for forging and uttering, &c. this order; and was founded on the statute 7 Geo. 2. c. 22., and the prisoner's counsel objected that the order in question, was not properly a warrant or order for the payment of money within that statute. He contended that it was not in its purport a compulsory or even a valid order within the statute 48 Geo. 3. c. 75., as it did not appear on the face of it that the person who was stated to have laid out the money, and to whom repayment thereof was ordered was one of the officers of the parish or place to whom, by that statute, a justice of the peace has authority to order a re-payment. And he contended also that the order must be compulsory which this was not, because it did not state all that was sufficient to entitle the person to the payment of the money: and further that the instrument also purported to be an order to pay to the person at whose expense the corpse was buried, and not to the officer of the parish or place who had repaid him. The learned Judge thought that the order, though it might not be compulsory, was not in itself a nullity, nor made void by the statute, but was still an order for the payment of money, and protected by the statute 7 Geo. 2. c. 22. But the prisoner being convicted a case was reserved for the consideration of the Judges. Several of the Judges thought the conviction wrong, being of opinion that the instrument was not properly a warrant or order for the payment of money within the 7 Geo. 2. c. 22. because the justices had no authority to make such an order, but in favour of a churchwarden, overseer, &c.: but a majority of the Judges thought the conviction right because it did not appear on the face of the order that I. S. *was not* a churchwarden, &c., and that if nothing ap-

report that the prisoner, Graham, was a *petty constable or other officer, &c.* A still better answer to the objection seems to be, that the order in question was neither a *certificate, receipt,*

or *note*, within the 18th section of the 17 Geo. 2. c. 5.

(y) *Rex v. Rushworth, cor. Bayley, J., York Sum. Ass. 1816, Russ. & Ry. 317.*

peared to the contrary, on the face of the order, they thought the treasurer bound to conclude that the justice had not made an order without satisfying himself that I. S. was a churchwarden, &c. (z)

It follows from these principles that an indictment for forging a warrant or order will be bad in form, if it appears, upon the face of it, that the person whose name was subscribed to the warrant or order had no authority to make them.

An indictment which charged the prisoner with forging an order for the delivery of goods stated that the order was subscribed by one L. D. "he, the said L. D., then and there being the *servant* of "one J. L. D. in his business of a silk dyer, and purporting to be "a warrant or order from the said L. D. *as such servant* of the said "J. L. D. for the delivery of 8lb. of raw silk." It appeared upon the evidence that L. D. whose name was forged, was, in fact, the son of J. L. D. and was apprenticed to his father, whose business of a silk-dyer was principally conducted by him. Amongst other objections, on behalf of the prisoner, it was urged that to bring the offence within the statute the order must purport to be made by a person who had an authority, or at least claimed an interest in the subject matter of it, and who took upon him to transfer it to the person in whose favour the order was made. That it was not averred in the indictment that L. D., whose order it purports, and is averred to be, had any authority over, or interest in, the goods in question, or any authority to make such an order, which ought to have been expressly alleged. It states that another person was the owner, namely, the father J. L. D., to whom the son was only a servant; and it cannot be inferred from that circumstance that the son had authority over the goods; and the want of such an averment cannot be supplied by parol evidence: on the contrary the order appears to have been made by an apprentice, who was not *sui juris*, and had no disposing power. The prisoner, having been convicted, the case was referred to the consideration of the the Judges, who held the conviction bad. The learned Judge, who delivered their opinion, said, "that on the construction of "the statute the forged warrant, or order for the delivery of the "goods, must purport to be the order of the owner, or of some "person who has, or at least claims, an interest in, or who has, "or at least assumes to have a disposing power over the goods, "and takes upon him to transfer the property or custody of them "to the person in whose favour such order is made." And, as to the form of the indictment, he said, "that it ought to have appeared "in the indictment that the person, whose name was subscribed "to the order, had an authority to make it; but that this could not "be collected by any legal inference from the words of the indictment; for L. D., the person whose name was forged, was stated "to be the *servant* of the owner, which excluded every idea that "he had or could claim any interest in the goods which were the "subject of the order: and that it ought to have been expressly "averred that he had authority to make it. (a)

It must not appear in the indictment that the person whose name was subscribed had no authority to make the warrant or order.

Clinch's case. Holden that it ought to have appeared in the indictment that the person whose name was subscribed to the order had an authority to make it.

(z) *Rex v. Froud, cor. Holroyd, J.*, 1819, *Russ. & Ry.* 389.
Cornwall Lent Ass. 1819, and *Trin. T.* (a) Clinch's case, *O. B.* 1791, de-

The order must be directed to the holder or person interested in, or having possession of the goods.

But if the order purport to be one which the party has a right to make, it will be within the act.

Lockett's case. A forged order on a banker holden to be within the statute, though made in a fictitious name, as it purported to be made by a person who kept cash with such banker.

In the foregoing case it was further objected, on behalf of the prisoner, that the instrument in question was not an order, but a bare request: that it was not directed to any person, and consequently was not, upon the face of it, compulsory upon the holder of the goods; and, further, that it ought to have appeared on the face of the indictment that the order was to the holder of the goods. (b) Upon these points the learned Judge, who delivered the opinion of the Judges, said, "that the order must be directed to the holder or person interested in or having possession of the goods. That the order set forth in the indictment was not directed to any person whatsoever; but merely expressed a desire that 8lb. of silk should be delivered to the bearer of it without any direction from whom it was to be received. And that on this ground, therefore, the Judges were of opinion that this was not a warrant or order within the statute." (c)

But it should be well observed that if the order purport to be one which the party has a right to make, although in truth he had no such right, and although no such person as the order purports to be made by existed in fact, it falls within the penalty of the statute. (d)

The prisoner, Charles Lockett, was convicted of knowingly uttering a forged order for the payment of money, in these words, "Messrs. Neale, Fordyce, and Down, pay, to Wm. Hopwood or bearer 16*l.* 10*s.* 6*d.* Rt. Vennest," with intent to defraud one John Scoles. (e) It appeared upon the evidence that the prisoner applied to Scoles, who was a colourman, and agreed to purchase goods to the amount of 10*l.* 0*s.* 6*d.*, which he was to send for. He went away taking with him a little Prussian blue; and afterwards came again, pretending to be in a hurry, and presented this note, which he said was a good one; and for which Scoles gave him 6*l.* 10*s.* being the difference. No such person as Rt. Vennest kept cash with Messrs. Neale and Co.; nor did it appear that there was any such man existing. Upon these facts it was submitted to the consideration of the Judges, whether this was an order within the statute; (f) and after very long consideration they at last agreed that it was forgery. They thought it quite immaterial whether such a man as Vennest existed or not; or if he did, whether he had kept cash at the banking house of Messrs. Neale and Co.: and that it was sufficient that the order assumed

cided by the Judges, 11th May, 1791, 2 East. P. C. c. 19. s. 37. p. 938. 3 Leach 54. And see *Rex v. Wilcox*, Russ. & Ry. 50. *Ante*, 360. And it seems therefore, that if the indictment states the person in whose name the order was forged to have been servant to I. S., and that the order was for the delivery of goods of I. S. it ought to shew that the servant as such had a disposing power over the goods, *MS. Bayley, J.*

(b) The form of the instrument was,

"Please to send by the bearer 8lb. of that whorpe hua market.
"L. Desemockex."

(c) Clinch's case, *ante*, note (a).

(d) 2 East. P. C. c. 19. s. 38. p. 940.

(e) The form of the order is given with some slight difference in another report. See *ante*, 468, note (m).

(f) The doubt was stated to have arisen on what was said in Mitchell's case, *ante*, 470.

those facts, and imported a right on the part of the drawer to direct such a transfer of his property.(g)

With respect to the form of the order in other respects, it appears not to be necessary that the particular goods should be therein specified, provided it be conceived in terms intelligible to the parties themselves, to whom such order is addressed.

In a case where the prisoner had been convicted of forging an order for the delivery of goods to the following purport: "Sept. 23d, 1764. Sir, please to deliver my work to the bearer,— Lydia Bell, Fleet-street, London," with intent to defraud the wardens and company of Goldsmiths; and it appeared that the goods in question were articles of plate which had been sent by Mrs. Bell, a silversmith, to Goldsmiths'-hall, to be marked; and that the form of the order was the same as was usually sent upon such occasions, except that in strictness, and by the rule of the plate-office, the several sorts of work, with the weight of the silver, ought to have been mentioned in it; the Judges affirmed the conviction upon reference to them, after a motion in arrest of judgment. But the prisoner was pardoned on condition of transportation.(h)

The order will not be the less the subject of forgery, on account of its not being available by reason of some collateral objection, not appearing upon the face of it. Thus, where the prisoner had been convicted for forging an order for the payment of prize-money, and it appeared that the party whose name was forged was a discharged seaman, and was, at the time the order bore date, within seven miles of the port where his wages were payable; under which circumstances his genuine order would not have been valid, by the provisions of the 32 Geo. 3. c. 34. s. 2. unless made in the manner therein prescribed; the Judges held the conviction to be proper, the order itself purporting on the face of it to be made at another place beyond the limited distance.(i)

Many other points which have arisen upon indictments framed upon the statutes set forth in this Chapter, being of general application, have been already noticed in the Chapter treating generally of the subject of Forgery.(k)

It remains only, in conclusion of this Chapter, to set forth the provisions of two statutes; the one 41 Geo. 3. c. 57. which was passed for the better prevention of the forgery of the notes and bills of exchange of persons carrying on the business of bankers, and relates to the fraudulent fabrication of certain printed forms of such securities, and paper of a certain description: the other, 43 Geo. 3. c. 139. which was passed for the preventing the forging of *foreign* bills of exchange, &c., and makes the engraving plates for such bills, &c. or the printing them without lawful authority,

As to the specification of the goods in the order.

Jones's case. Order in the following form: "Please to deliver my work to the bearer."

An order not available by reason of some collateral objection may yet be the subject of forgery.

Statutes for the prevention of forgery. 41 Geo. 3. c. 57. as to the fabrication of the printed forms and paper used for bankers' securities. And 43 Geo. 3. c.

(g) Lockett's case, O. B. 1771, Trin. T. 1774. 1 Leach 94. 2 East. P. C. c. 19. s. 38. p. 940. S. P. in Abraham's case, 1774. 2 East. P. C. c. 19. s. 38. p. 941. The prisoners in each case received judgment of death accordingly.

(h) Jones's case, 1764, 1 Leach 53. 2 East. P. C. c. 19. s. 39. p. 941.

(i) M'Intosh's case, 1800, 2 East. P. C. c. 19. s. 39. p. 942. 2 Leach 883. *Ante* 345. The same case is cited for another point, *ante* 469.

(k) *Ante* 317, *et sequ.*

139. as to engraving plates or printing foreign bills of exchange, &c. without authority.

41 Geo. 3. c. 57. s. 1. Any person who shall make or use any frame or mould for making paper, with the name or firm of any persons or body corporate appearing in the substance of the paper, without a written authority for that purpose, or shall make or vend such paper, or cause such name or firm to appear in the substance of the paper, whereon the same shall be written or printed, shall be imprisoned for the first offence not exceeding two years nor less than six months; and for the second, transported for seven years.

S. 2. If any person shall engrave, &c. any bill, or note of any person or banking company, or use any plate so engraved, or any device for making or printing such bill or note, or shall knowingly have in his custody such plate or device, or shall utter such bill or note without a written autho-

a misdemeanor, punishable, in case of a second offence, by transportation.

The 41 Geo. 3. c. 57. s. 1. enacts "that if any person or persons in any part of the united kingdom of Great Britain and Ireland, shall make or cause or procure to be made, or knowingly aid or assist in the making or using of any frame, mould, or part of any frame or mould, for the making of paper, with the name or firm appearing visible in the substance of the paper, of any person or persons, body corporate, or other banking company or partnership, carrying on the business of bankers, without an authority in writing for that purpose from such person or persons, body corporate, or other banking company or partnership, or from some person or persons duly authorised to give such authority; or shall manufacture, make, vend, expose to sale, publish or dispose of, or cause or procure to be manufactured, made, vended, or exposed to sale, published or disposed of, any paper having the name or firm appearing visible in the substance of the paper of any person or persons, body corporate, or other banking company or partnership whatsoever, carrying on the business of bankers; or if any person or persons, without such authority, shall, by any act, means, mystery, or contrivance, cause or procure, or shall knowingly aid or assist in causing or procuring the name or firm of any person or persons, body corporate, or other banking company or partnership, carrying on the business of bankers, to appear visible in the substance of the paper, whereon the same shall be written or printed, every person or persons so offending in any of the cases aforesaid, and being convicted thereof according to law, shall, for the first offence, be imprisoned for any time not exceeding two years, nor less than six months; and for the second offence be transported to any of his Majesty's colonies or plantations for the term of seven years."

The second section of this statute enacts, "that if any person or persons, in any part of the united kingdom of Great Britain and Ireland, shall engrave, cut, etch, scrape, or by any other means or device make, or shall cause or procure to be engraved, cut, etched, scraped, or by any other means or device made, or shall knowingly aid or assist in the engraving, cutting, etching, scraping, or by any other means or device making, in or upon any plate whatsoever, any bill of exchange, promissory note, or other note for the payment of money, or part of any bill of exchange, promissory note, or other note for the payment of money, purporting to be the bill of exchange, promissory note, or other note for the payment of money, of any person or persons, body corporate, banking company or partnership, carrying on the business of bankers, without an authority in writing for that purpose, from such person or persons, body corporate, banking company or partnership, or some person or persons duly authorised to give such authority; or shall use any such plate so engraved, cut, etched, scraped, or by any other means or device made, or shall use any other device for the making or printing any such bill of exchange, promissory note, or other note for the payment of money, without such

“ authority in writing as aforesaid; or if any person or persons shall, without such authority as aforesaid, knowingly have in his, her, or their custody, any such plate or device, or shall, without such authority as aforesaid, knowingly and wilfully publish, disseminate, or put away any such bill of exchange, promissory note, or other note for the payment of money, or part of such bill of exchange, promissory note, or other note for the payment of money; every person so offending in any of the cases aforesaid, and being convicted thereof according to law, shall, for the first offence, be imprisoned for any time not exceeding two years nor less than six months; and for the second offence be transported to any of his Majesty’s colonies or plantations for the term of seven years.”

“ rity for the purpose, such person shall be punishable in the same manner.”

Upon an indictment on this section of the statute, which charged the prisoner with having in his custody a plate on which was engraved part of a promissory note, purporting to be the promissory note of a body corporate called the *British Linen Company*, it was objected that it was not an offence within this statute, to have in custody a plate for making notes, &c. in the name of such company, though it appeared that they carried on business as bankers, because they were incorporated for a purpose entirely different, viz. that of carrying on a linen company; and it was also objected, that the indictment was bad, as it omitted to aver that the company carried on the business of bankers, which the act requires. The objections having been reserved for the consideration of the Judges, they seemed to be of opinion that the first objection was fatal; and were all of opinion that the indictment was bad, for the reason stated in the second, and that judgment should be arrested. (1)

The third section of the statute enacts, “ That if any person or persons in any part of the united kingdom of Great Britain and Ireland, shall engrave, cut, or etch, or by any other means or contrivance trace with a hair-stroke or other mode of delineation, on any plate whatsoever, any of the subscriptions subjoined to any bill of exchange, promissory note, or other note for the payment of money, of any person or persons, body corporate, or other banking company or partnership carrying on the business of bankers, to be payable to bearer on demand, or shall have in his, her, or their possession any plate with the hair-strokes or other delineation of any subscription traced thereon, subjoined to any bill of exchange, promissory note, or other note for the payment of money, purporting to be the bill of exchange and promissory note, or other note for the payment of money, of any person or persons, body corporate, or other banking company or partnership carrying on the business of bankers, and to be payable to the bearer on demand, and shall not be able to prove that such plate came into his, her, or their possession, without his, her, or their knowledge or consent, every person so offending in any of the cases aforesaid, and being convicted thereof according to law, shall for the first offence be

S. 3. If any person shall engrave, &c. on any plate any subscriptions subjoined to any bill or note of any person or banking company, payable to bearer on demand, or have in his possession any such plate, he shall, for the first offence, be imprisoned not exceeding three years, nor less than 12 months; and for the second offence be transported for 7 years.

43 Geo. 3. c. 139. s. 2. Persons engraving plates for foreign bills of exchange, &c. or printing them, without lawful authority, to be deemed guilty of a misdemeanor.

Proviso that the act shall not alter any law in force for the punishment of forgery.

“imprisoned for any time not exceeding three years nor less than twelve months, and for the second offence be transported to any of his Majesty’s colonies or plantations for the term of seven years.”

The 43 Geo. 3. c. 139. s. 2. enacts, “That no person shall, within any part of the united kingdom of Great Britain and Ireland, engrave, cut, etch, scrape, or by any other means or device make or knowingly aid or assist in the engraving, cutting, etching, scraping, or by any other means or device making, in or upon any plate whatsoever, any bill of exchange, or any promissory note or undertaking, or order for the payment of money, purporting to be the bill of exchange, promissory note, undertaking, or order of any foreign prince, state or country, or of any minister or officer entrusted by or employed in the service of any foreign prince, state, or country, or of any person, or company of persons, resident or being in any foreign state or country, or of any body corporate and politic, or body in the nature of a body corporate and politic, or constituted by any foreign prince or state, or any part of any such bill of exchange, promissory note, undertaking, or order, without an authority in writing for that purpose from such foreign prince, state, or country, minister or officer, person, company of persons, or body corporate and politic, or body in the nature of a body corporate and politic, or from some person duly authorised to give such authority, or shall within any part of the said United Kingdom, without such authority as aforesaid, by means of any such plate, or by any other device or means, make or print any such foreign bill of exchange, promissory note, undertaking, or order for the payment of money, or any part thereof, or knowingly, wilfully, and without lawful excuse, (the proof whereof shall lie upon the party accused,) have in his or her custody any such plate or device, or any impression taken from the same; and if any person shall offend in any of the cases aforesaid, he shall be deemed and taken to be guilty of a misdemeanor and breach of the peace; and, being thereof convicted according to law, shall be liable for the first offence to be imprisoned for any time not exceeding six months, or to be fined or to be publicly or privately whipped, or to suffer one or more of the said punishments, and for the second offence to be transported to any of his Majesty’s colonies or plantations for the term of fourteen years.” It then provides that nothing contained in the act shall extend in any manner whatsoever to repeal or alter any law or statute at that time in force for the prevention or punishment of the crime of forgery within any part of the United Kingdom.

CHAPTER THE FORTIETH.

OF FALSELY PERSONATING ANOTHER.

THE bare fact of personating another, for the purpose of fraud, is no more than a cheat or misdemeanor at common law, and punishable as such. (a) And the principal cases in which it has been considered as indictable have been laid as cases of conspiracy. Offence at common law.

In a case where the prisoner had been acquitted on an indictment preferred against him for forgery, upon its appearing that he had merely passed himself off for the person whose real signature appeared on the instrument, in concert with that person, (b) he was indicted again for the misdemeanor: but it is observed that this second indictment did not turn singly on the fact of such false personating for a fraudulent purpose, but was framed against him and his associates for the conspiracy as well as the cheat. (c) And where a woman, living in the service of her master, conspired with another man that he should personate her master, and in that character should solemnize a marriage with her, which was accordingly done, for the purpose of afterwards raising a specious title to the property of the master; the gist of the indictment was for the conspiracy, and the conviction proceeded upon that ground. (d) And in a case where a cheat was effected by one person pretending to be a merchant, and another pretending to be a broker, we have seen that judgment appeared ultimately to have been given for the crown, on the ground that it was a case of conspiracy. (e) A case however is reported, in which the indictment only charged that the defendant personated a clerk to a justice of the peace, with intent to extort money from several persons, for procuring their discharge from misdemeanors for which they stood committed; and the Court refused to quash it upon motion, and put the defendant to demur to it. (f) But it is observed, that it might probably

(a) 2 East. P. C. c. 20. s. 6. p. 1010.

(b) *Ante*, 323, 324.

(c) 2 East. P. C. c. 20. s. 6. p. 1010. The defendants were convicted upon this second indictment.

(d) *Rex v. Robinson and Taylor*, O. B. 1746. 1 Leach 37. 2 East. P.

C. c. 20. s. 6. p. 1010.

(e) *Reg. v. Macarty and Fordenborough*, *ante*, 291.

(f) *Dupee's case*, 12 Geo. 1. 2 Sess. Cas. 11. 2 East. P. C. c. 20. s. 6. p. 1010.

have occurred to the Court that this was something more than a bare endeavour to commit a fraud by means of falsely personating another; that it was an attempt to pollute and render odious the public justice of the kingdom, by making it a handle and pretence for corrupt practices.(g) How far the *refusal* to quash the indictment upon motion can be considered as an authority is questionable; as we have seen that it was the practice of the Court, as often declared, not to quash on motion indictments for offences founded in fraud or oppression, though such indictments might appear not to be sustainable, but to leave the defendants to plead.(h)

Of the offence
by statutes.

The offence of falsely personating another for purposes of fraud is so nearly allied to forgery, and so often blended with it, that these offences have been frequently included by the legislature in the same enactments, and made felonies alike subject to capital punishment. Many of the statutes, therefore, which relate to falsely personating, with a few cases determined upon their construction, have necessarily been introduced in the preceding chapters; as those concerning the personating the proprietors of public stocks, &c.(i) and the personating of soldiers and seamen, and their widows, &c. in order to obtain wages, pensions, prize-money, &c.(j) But the general provision of the 5 Geo. 4. c. 107. may properly be introduced in this place.

5 Geo. 4. c. 107.
s. 5. Person-
ating and
falsely assum-
ing the name,
&c. of soldiers
or sailors, in
order to obtain
prize money,
pay, pension,
&c. felony,
punishable by
transporta-
tion, &c.

The fifth section of that statute recites it to be expedient, that the crimes of personating and falsely assuming the name and character of any person entitled to prize money or pension, for the purpose of fraudulently receiving the same, should no longer be punished with death, and then enacts, "that from and after the passing of this act, whosoever shall willingly and knowingly personate, or falsely assume the name or character of any officer, soldier, seaman, marine, or other person, entitled or supposed to be entitled, to any wages, pay, pension, prize money, or other allowance of money for service done in his Majesty's army or navy, or shall personate or falsely assume the name or character of the executor or administrator, wife, relation, or creditor of any such officer or soldier, seaman, marine, or other person, in order fraudulently to receive any wages, pay, pension, prize money, or other allowances of money due or supposed to be due for or on account of the services of any such officer or soldier, seaman, or marine, or other person, every such person being thereof convicted, shall be liable, at the discretion of the Court, to be transported beyond seas for life, or for any term of years not less than seven, or to be imprisoned only, or imprisoned and kept to hard labour in the common gaol or house of correction for any time not exceeding seven years."

The persona-
nating must be
of some sea-
man, &c. shewn
to have been
in existence.

Upon some of the former statutes relating to the false personating of seamen, it was decided, that as the false personating must be done in order to receive the wages, &c. of some seaman, &c. *entitled or supposed to be entitled thereto*, there must be some evidence to shew that there was such a person of the name and

(g) 2 East. P. C. c. 20. s. 6. p. 1011.

(h) *Ante*, 294, note (f).

(i) *Ante*, 388, *et sequ.*

(j) *Ante*, 436, *et sequ.*

character assumed, who was either entitled, or might *prima facie* at least be supposed to be entitled to receive the wages, &c. attempted to be acquired. Thus where the prisoner was indicted on the 31 Geo. 2. c. 10. for personating and falsely assuming the name and character of Wm. Wheeler, a person supposed to be entitled to prize money, for service done on board his Majesty's ship *Terpsichore*, in order to receive certain prize money, &c. one of the objections taken after conviction was, that there was no evidence that Wm. Wheeler ever served on board the *Terpsichore* in any capacity; or, indeed, that any such person existed: and the Judges, after a conference, held that the conviction was wrong, there being no evidence that there was any such person as Wm. Wheeler, who either was entitled, or at least *prima facie* entitled to prize money, as a seaman on board the *Terpsichore*. (k)

In a case upon one of the former statutes, 54 Geo. 3. c. 93. s. 89. the indictment charged the prisoner with personating and falsely assuming the name and character of one Joshua Boatwright, a seaman entitled to certain prize money; and it was proved that the prisoner applied at *Greenwich* hospital for prize money in the name of Boatwright: but it appeared that he did not obtain the money, and that Boatwright was then dead. The counsel for the prisoner objected, that to personate Boatwright under these circumstances, or to assume his name and character, was not an offence within the meaning of the act, which related only to existing persons; that after the death of Boatwright he could not be entitled to prize money, but that the personal representatives or next of kin were the persons entitled, and that in fact he was not supposed to be entitled to prize money, since it was supposed at the prize office that he was dead, and that his next of kin was in the course of obtaining administration in order to receive it. The prisoner was found guilty, and the point being reserved for the consideration of the Judges, they were of opinion that the conviction was right; and that the statute applied, though the seaman personated was dead. (l) So where the prisoner personated one Cuff, who was dead, and whose prize money had been paid to his mother, the Judges were of opinion that a conviction upon the same statute was right. (m)

In a case upon the statute 57 Geo. 3. c. 127. s. 4. (n) the indictment charged the prisoner with wilfully and knowingly personating, and falsely assuming the name and character of Peter *M'Cann*, a person entitled to prize money for and in respect of his services performed on board of a ship of his Majesty's called the *Tremendous*, in order to receive such prize money, with intent to defraud the commissioners and governors of the *Greenwich* hospital: and a second count described Peter *M'Cann* as a person supposed to be entitled, &c. for services supposed to have

Personating and assuming the name of persons who were dead, held to be within the statutes.

The personating must be of some person by his correct name, who was entitled, or supposed to be entitled, to prize money, &c. and it must be so charged in the indictment.

(k) *Brown's case*, 2 East. P. C. c. 20. s. 4. p. 1007. S. P. in *M'Annely's case*, *Ibid.* p. 1009.

(l) *Rex v. Martin*, East. T. 1817. Russ. & Ry. 324.

(m) *Rex v. Cramp*, East. T. 1817. *Id.* 327.

(n) *Ante*, p. 437. The clause respecting personating in this statute was nearly similar in the description of the offence with that above stated, of the 5 Geo. 4. c. 107.; but it imposed capital punishment.

been performed. Upon the evidence it appeared by the prize list and muster book of the Tremendous, produced by the proper officer from *Greenwich* hospital, that there was a person of the name of Peter *M'Carn* entitled to prize money, but no person of the name of Peter *M'Cann*. The learned Judge, by whom the prisoner was tried, inclined to direct an acquittal upon this variance in the name, but he ultimately left the case to the jury, directing them to say whether the prisoner intended to personate Peter *M'Carn*. The jury found that he did so intend, and returned a verdict of guilty; upon which judgment was respited, and the point reserved for the consideration of the twelve Judges, who were of opinion that the "personating" must apply to some person who had belonged to the ship, and that the indictment must charge a personating of some such person: and as that was not the case here, they held the conviction wrong.(o)

Aiders and
abettors.

It was held upon the same statute, 57 Geo. 3. c. 127. s. 4., that all persons present aiding and abetting another in the personating and falsely assuming the name, &c. of a seaman, were principals, and that the offence was not confined to the individual only by whom the seaman was personated.(p)

It remains now to mention the statutes which relate to the acknowledging of deeds, fines, bail, &c. in the name of another.

21 Jac. 1. c. 26.
s. 2. Acknowledging any fine, recovery, deed, statute, bail, or judgment, in the name of a person not privy or consenting thereto, made felony without clergy.

The statute 21 Jac. 1. c. 26. s. 2. enacts, "That all and every person and persons which shall acknowledge or procure to be acknowledged, any fine or fines, recovery or recoveries, deed or deeds inrolled, statute or statutes, recognizance or recognizances, bail or bails, judgment or judgments, in the name or names of any other person or persons not privy or consenting to the same," shall be adjudged felons, and suffer death without benefit of clergy. The attainder is not to be any corruption of blood, nor loss of dower; and the act is not to extend to any judgment acknowledged by any attorney of record, for any person against whom any such judgment shall be had or given.(q)

In the construction of this statute it has been holden, that the bare personating of bail before a Judge at chambers, or the acknowledging thereof in another name, is no felony, but only a misdemeanor, unless the bail be filed.(r) But yet it appears in one case that the offence was considered as complete by the personating; as though the bail-piece was filed at Westminster, the trial was had in London, the county where the bail was personated.(s) It seems that if bail be put in under feigned names of persons who have no existence, the offender cannot be prosecuted upon this statute for felony.(t)

(o) *Rex v. Tannet*, East. T. 1818. Russ. & Ry. 351.

(p) *Rex v. Potts*, East. T. 1818. Russ. & Ry. 353.

(q) S. 3.

(r) 1 Hale 696. *Timberly's case*, 2 Sid. 90. 1 Hawk. P. C. c. 47. s. 5. 2 East. P. C. c. 20. s. 4. p. 1009.

(s) *Beasley's case*, T. Jones 64. 1 Hawk. P. C. c. 47. s. 4. But in 2 East. P. C. c. 20. s. 5. p. 1010, it is observed

that according to the report of the same case in *Ventris*, (1 Vent. 301.) *Twisden, J.*, said, that it must be tried in *Middlesex*, where the bail-piece was filed: the entry being *venit coram domino rege, &c.*

(t) *Anon.* 1 Str. 384. 1 Hawk. P. C. c. 47. s. 6. But the Court in this case ordered the bail and the attorney to be set in the pillory.

The statute 21 Jac. 1. c. 26. extending only to proceedings in the courts themselves, a subsequent statute, 4 W. & M. c. 4. made it felony to personate any other person as bail before any Judge of assize, or commissioner appointed to take bail in the country. This statute, for the greater ease of persons in actions or suits in the courts at *Westminster*, impowers the Chief Justices of the Courts of King's Bench and Common Pleas, and the Chief Baron, respectively, together with one other Judge of their respective courts, to appoint commissioners (other than common attornies and solicitors) in all the counties in England and Wales, and in Berwick-upon-Tweed, to take recognizances of special bail or bail pieces in actions or suits depending in those courts. And then (by s. 4.) it is enacted, "that any person or persons who shall, before any person or persons impowered by virtue of this act, as aforesaid, to take bail or bails, represent or personate any other person or persons, whereby the person or persons so represented and personated, may be liable to the payment of any sum or sums of money for debt or damages, to be recovered in the same suit or action, wherein such person or persons are represented and personated, as if they had really acknowledged and entered into the same," being convicted thereof, shall be adjudged felons, suffer the pains of death, and incur such forfeitures and penalties as felons in other cases convicted or attainted.

The statute 27 Geo. 3. c. 43., which was passed for regulating the taking of special bail in actions and suits, depending in the court of great session for the county palatine of *Chester*, contains a clause (s. 4.) similar to that just set forth, by which those who personate bail before any person empowered by virtue of that act to take special bail, are made guilty of felony, and liable to the penalties, &c. of the 4 W. & M. c. 4.

4 W. & M. c. 4.
Personating
bail before any
Judge of as-
size or com-
missioner in
the country,
made felony.

27 Geo. 3. c.
43. Persona-
ting bail in
Chester made
felony in like
manner.

CHAPTER THE FORTY-FIRST.

OF MALICIOUS INJURIES TO PROPERTY.

WE now come to the consideration of those injuries to property which proceed rather from malicious or wanton motives, than from any proposed gain to the offender. Injuries of this kind were made punishable by different statutes passed from time to time, as they appeared to be required for the protection of the community; but it has lately been deemed expedient that these statutes should be repealed, and that the provisions contained in them should be amended and consolidated into one statute, and accordingly the 7 & 8 Geo. 4. c. 30. was passed into a law.

The several enactments of this statute will be mentioned in the succeeding chapters, in such arrangement as may seem most appropriate: but its general provisions may be properly stated in the first instance.

Malice against the owner of the property not necessary in offences of this kind.

7 & 8 Geo. 4. c. 30. s. 25.

S. 26. Principals in the second degree and accessories.

The 25th section of the statute enacts, that malice against the owner of the property shall not be essential in offences of this description; an ingredient in the offences under some of the repealed statutes which had often obstructed the course of justice, and (as in the instance of maiming cattle) had screened the perpetrators of very barbarous acts from deserved punishment.^(a) The words of this section of the statute are, "that every punishment and forfeiture by this act imposed on any person maliciously committing any offence, whether the same be punishable upon indictment, or upon summary conviction, shall equally apply and be enforced, whether the offence shall be committed from malice conceived against the owner of the property in respect of which it shall be committed, or otherwise."

With respect to principals in the second degree and accessories, the 26th section enacts, "that in the case of every felony, punishable under this act, every principal in the second degree, and every accessory before the fact, shall be punishable with death or otherwise, in the same manner as the principal in the first degree is by this act punishable; and every accessory after the fact to any felony punishable under this act shall, on conviction, be liable to be imprisoned for any term not exceeding two years;

(a) An alteration had been made in this respect as to the offence of maim-

ing cattle by 4 Geo. 4. c. 54. now repealed by 7 & 8 Geo. 4. c. 27.

“and every person who shall aid, abet, counsel, or procure the commission of any misdemeanor punishable under this act, shall be liable to be indicted and punished as a principal offender.”

The 27th section enacts, “that where any person shall be convicted of any indictable offence punishable under this act, for which imprisonment may be awarded, it shall be lawful for the Court to sentence the offender to be imprisoned, or to be imprisoned and kept to hard labour, in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement for the whole or any portion or portions of such imprisonment, or of such imprisonment with hard labour, as to the Court in its discretion shall seem meet.”

S. 27. Punishment of hard labour and solitary confinement may be inflicted.

And with respect to the apprehension of offenders, the 28th section enacts, “that any person found committing any offence against this act, whether the same be punishable upon indictment or upon summary conviction, may be immediately apprehended, without a warrant, by any peace officer, or the owner of the property injured, or his servant, or any person authorised by him, and forthwith taken before some neighbouring justice of the peace, to be dealt with according to law.”

S. 28. Apprehension of persons found committing any offences may be without a warrant.

Offences amounting to felony or misdemeanor, punishable under this act, and committed within the *Admiralty* jurisdiction, are (by s. 43.) to be dealt with, tried, &c. in the same manner as any other felony or misdemeanor committed within that jurisdiction.

Trial of offences committed within the *Admiralty* jurisdiction.

The statute contains various regulations as to the summary proceedings by conviction before magistrates, which are authorised by its provisions for the punishment of minor offences. It limits the time for the prosecution of offences punishable on summary conviction, gives the mode of compelling the appearance of offenders, makes abettors in such offences punishable as principal offenders, gives a form of conviction, allows an appeal in certain cases, and contains provisions as to the application of the forfeitures and penalties, and as to several other matters.(b)

Summary proceedings authorised by the statute.

The general provisions of the 7 Geo. 4. c. 64. as to offences committed on the boundaries of counties, or begun in one county and completed in another, or committed during a journey or voyage, and the provisions as to the statement of property, and as to the trial, &c. of accessories, will apply to offences by malicious injury.(c)

General provisions of 7 Geo. 4. c. 64. applicable to malicious injuries.

(b) See the statute, s. 29. *et sequ.* *Addend.* to this volume.

(c) See the statute, *Addend.* to the first volume.

CHAPTER THE FORTY-SECOND.

OF ARSON AND THE BURNING OF BUILDINGS, MINES, SHIPS,
CORN, TREES, &c.

Offence of
arson at com-
mon law.

ARSON is, at common law, an offence of the degree of felony; and has been described as *the malicious and wilful burning the house of another*. (a) The burning a party's own house does not come within this definition: but the burning a man's own house in a town, or so near to other houses as to create danger to them, is a great misdemeanor at common law. (b) Barns, with corn or hay within them, have been considered as so much entitled to the protection of the law, that though distant from a house, and no part of the mansion, the burning of them is felony at common law. (c)

There must
be an actual
burning.

The burning necessary to constitute arson of a house at common law must be an *actual burning* of the whole or some part of the house. Neither a bare intention, nor even an actual attempt to burn a house by putting fire into, or towards it, will amount to the offence, if no part of it be burned; but it is not necessary that any part of the house should be wholly consumed, or that the fire should have any continuance; and the offence will be complete, though the fire be put out, or go out of itself. (d)

The burning
must be mali-
cious and wil-
ful.

The burning must also be *malicious and wilful*; otherwise it is only a trespass. No negligence or mischance, therefore, will amount to such burning. (e) And for this reason it has been holden, that if an unqualified person should, in shooting at game, happen to set fire to the thatch of a house, it will not be a burning of this description. (f) And so if a man unlawfully shoot at the poultry of another: (g) but it is observed, that in such case it should seem to be understood that the party did not intend to steal the poultry, but merely to commit a trespass; for otherwise

(a) 3 Inst. 66. 1 Hale 566. 1 Hawk. P. C. c. 39. 4 Black. Com. 220. 2 East. P. C. c. 21. s. 1. p. 1015.

(b) 1 Hale 568, 569. 1 Hawk. P. C. c. 39. s. 15. 4 Black. Com. 221. 2 East. P. C. c. 21. s. 7. p. 1027.

(c) 3 Inst. 67. Barham's case, 4 Co. 20 a. Sum. 86. 1 Hawk. P. C. c. 39. s. 1. 4 Black. Com. 221.

(d) 3 Inst. 66. Dalt. 506. 1 Hale 568, 569. 1 Hawk. P. C. c. 39. s. 16, 17. 2 East. P. C. c. 21. s. 4. p. 1020.

(e) 3 Inst. 67. 4 Black. Com. 222.

(f) 1 Hale 569, where this is laid down contrary to the opinion of Dalt. c. 105. p. 506.

(g) *Id. Ibid.*

the first intent being felonious, the party must abide all the consequences. (h)

The malicious and wilful burning effected need not correspond with the precise intent or design of the party. If A. have a malicious intent to burn the house of B. and in setting fire to it burn the house of C. also, or if the house of B. escape by some accident, and the fire take in the house of C. and burn it, this shall be said in law to be the malicious and wilful burning of the house of C. though A. did not intend to burn that house. (i) And accordingly it has been said, that if one man command another to burn the house of J. S. and he do so, and the fire thereof burn another house, the commander is accessory to the burning such other house. (k)

The malicious and wilful burning need not correspond with the precise intent of the party.

And such malicious and wilful burning of the house of another may be by the means of setting fire to the party's own house; and this, though it should appear that the primary intention of the party was only to burn his own house. If in fact other houses were burnt, being adjoining, and in such a situation as that the fire must in all probability reach them, the intent being unlawful and malicious, and the consequences immediately and necessarily following from the original act done, the offence will be felony. (l) Thus where the defendant was indicted for a misdemeanor, in burning a house in his own occupation, such house being alleged to be contiguous and adjoining to certain dwelling-houses of divers liege subjects, &c.; and the facts of the case, as opened by the counsel for the prosecution, appeared to be that the defendant set fire to his own house, in order to defraud an insurance office, and that, in consequence, several houses of other persons, adjoining to his own, were burnt down; Buller, J., said, that if other persons' houses were in fact burnt, although the defendant might only have set fire to his own, yet under these circumstances the prisoner was guilty, if at all, of felony, (the misdemeanor being merged) and could not be convicted on this indictment; and, therefore, he directed an acquittal. (m) And in a case of a similar kind, which occurred about the same time, Grose, J., in passing sentence in the Court of King's Bench, said, that if it had so happened, that any of the neighbouring houses had been set on fire in consequence of the defendant's wilful and malicious act in setting fire to his own house, (which was proved to have been done in order to cheat the insurance office,) it would clearly have amounted to a capital felony, and his life would have paid the forfeit. (n)

It may be effected by setting fire to the party's own house.

In order, however, to constitute the felonious offence of arson at common law, the fire must burn the house of *another*. Therefore, it has been holden not to be felony in a party to burn a house, whereof he was in possession under a lease for years. (o)

The fire must burn the house of *another*.

(h) 2 East. P. C. c. 21. s. 3. p. 1019. *Ante*, Vol. I. 454, 455.

(i) 1 Hale 569. 3 Inst. 67. 1 Hawk. P. C. c. 39. s. 19. And the indictment may charge it accordingly.

(k) Plowd. 475. 2 East. P. C. c. 21. s. 7. p. 1031.

(l) 2 East. P. C. c. 21. s. 8. p. 1031. And see the case of *Coke v. Wood-*

burne, 6 St. Tri. (by Hargr.) 222.

(m) Isaac's case, *cor.* Buller, J., 1799. 2 East. P. C. c. 21. s. 8. p. 1031.

(n) Probert's case, B. R. Mich. T. 40 Geo. 3. 2 East. P. C. c. 21. s. 7. p. 1031.

(o) Holmes's case, Cro. Car. 376. W. Jones 351.

And it was decided, that a person in possession of a copyhold dwelling-house could not be guilty of arson, by burning it, although he had a long time before surrendered it into the hands of the lord of the manor to the use of another person his heirs and assigns, for securing the payment of money borrowed: for it was considered, that while the tenant continued in possession, it was his own house. (p) And upon the same principle it was decided; that a tenant in possession under an agreement for a lease for three years, from a person who held under a building lease, was not guilty of arson by burning the house. (q)

But if a landlord, or reversioner, sets fire to his own house of which another is in possession, under a lease from himself, or from those whose estate he hath, it shall be accounted arson; for, during the lease, the house is the property of the tenant. (r) And it was determined, that a widow, entitled to dower, but not having it assigned, from a house, the equity of redemption of which had descended from her husband to his eldest son, for whose benefit she had let it and received the rent, was guilty of arson, by burning it while in the possession of her tenant. (s)

It should be observed, however, that a mere residence in a house, without any interest therein, will not prevent it from being considered as the house of *another*. As where the prisoner was a poor man, maintained by a parish, and had, some time before the commission of the crime, been put by the parish officers to live in the house which he was charged with burning, and was resident therein with his family at the time of the fact being committed, having the sole possession and occupation of it, but without payment of any rent; all the Judges held that it could not be considered as *his* house; and that he was properly convicted of the arson. (t)

It will be presently seen that the questions as to the possession and ownership of the house in which the arson is committed are of less importance under the statute law; as the 7 & 8 Geo. 4. c. 30. makes the setting fire to a house, &c. *with intent to injure or defraud any person*, a capital offence, whether such house, &c. shall be in the possession of the person so setting fire thereto, or of others.

The remaining enquiry concerning arson at common law is as to the meaning of the word *house*. And this, it may be briefly ob-

Of what is included in the term *house*.

(p) Spalding's case, *Bury Lent Ass.* 1780. East. T. 1780. 1 Leach 218. 2 East. P. C. c. 21. s. 6. p. 1025.

(q) Breeme's case, O. B. 1780, Trin. T. 1780. 1 Leach 220. 2 East. P. C. c. 21. s. 6. p. 1026. And this and several of the preceding cases were recognised in Pedley's case, K. B. 1782. 1 Leach 242. where Lord Mansfield said that Holmes's case, (ante, note (o).) was confirmed to be good law; though he very much lamented that the law was so settled; and the bias of his mind was in favour of Mr. Justice Foster's opinion in Harris's case, Fost.

115. In a case which occurred shortly afterwards, Lord Mansfield said, that "it was certainly true that it could be no felony in the defendant to burn a house of which he was in possession." Schofield's case, K. B. Hil. T. 24 Geo. 3. Cald. 397. 2 East. P. C. c. 21. s. 7. p. 1028.

(r) Fost. 115. 4 Black. Com. 221.

(s) Harris's case, 1753. Fost. 113. 2 East. P. C. c. 21. s. 6. p. 1023.

(t) Gowen's case, 1786. 2 East. P. C. c. 21. s. 6. p. 1027. Rickman's case, *Ibid.* s. 11. p. 1034.

served, extends not only to the dwelling-house, but to all out-houses, which are *parcel* thereof, though not adjoining thereto, or under the same roof; (u) of which kind of out-houses mention has been made in a former part of this work. (x) It appears that the indictment need not charge the burning to be of a *mansion* house, but only of a *house*. (y)

It has been already stated, that the burning a man's own house in a town, or so near to other houses as to create danger to them, though not within the definition of arson, is yet a great misdemeanor at common law. (z) This doctrine has been acted upon in several cases: (a) and, in one of the most recent, Grose, J., in pronouncing the sentence of the Court of King's Bench, said, that though by a lenient construction of the law of arson this offence was holden not to be felony, yet it was a misdemeanor of great magnitude, and deserving of the most exemplary punishment. (b)

For the punishment of felonies upon which no punishment may be inflicted by statute, the general provision of the 7 & 8 Geo. 4. c. 28. enacts, "That every person convicted of any felony for which no punishment hath been or hereafter may be specially provided, shall be deemed to be punishable under this act, and shall be liable at the discretion of the Court to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years; and, if a male, to be once, twice, or thrice publicly or privately whipped, (if the Court shall so think fit) in addition to such imprisonment." And by s. 9. the Court may order hard labour, or solitary confinement as part of such imprisonment. (c)

We may now proceed to the enactments of the statute 7 & 8 Geo. 4. c. 30.

The second section of that statute enacts, "That if any person shall unlawfully and maliciously set fire to any church or chapel, or to any chapel for the religious worship of persons dissenting from the united church of England and Ireland, duly registered or recorded, or shall unlawfully and maliciously set fire to any house, stable, coach-house, outhouse, warehouse, office, shop, mill, malt-house, hop-oast, barn, or granary, or to any building or erection used in carrying on any trade or manufacture, or any branch thereof, whether the same or any of them respectively shall then be in the possession of the offender, or in the possession of any other person, with intent thereby to injure or

Misdemeanor in burning a man's own house, when contiguous to others.

Punishment for felony not punishable by any statute.

7 & 8 Geo. 4. c. 30.

S. 2. Setting fire to any church, &c. or any house, &c. or to certain buildings.

(u) 3 Inst. 67. 1 Hale 570. 1 Hawk. P. C. c. 39. s. 1. Sum. 86. 4 Black. Com. 221. 2 East. P. C. c. 21. s. 5. p. 1020.

(x) *Ante*, 14, 56.

(y) 3 Inst. 67. Sum. 86.

(z) *Ante*, 486.

(a) Holmes's case, Cro. Car. 376. Scofield's case, Cald. 397. 2 East. P. C. c. 21. s. 6. p. 1023. and s. 7. p. 1028. It appears from these cases that where an indictment charges an act to have been done with a *felonious* intent, and the jury find a verdict of guilty; if

the charge, as laid, do not amount to felony, but amounts in law to a misdemeanor, the Court will pronounce judgment as for that offence.

(b) Probert's case, B. R. Mich. 40 Geo. 3. 2 East. P. C. c. 21. s. 7. p. 1030. The sentence pronounced was two years' imprisonment in Newgate, to stand once during that time in the pillory, and to give sureties for good behaviour for seven years from the expiration of the imprisonment.

(c) See the statute *Addend.* to this Volume.

S. 5. Setting
fire to a coal
mine.

“defraud any person, every such offender shall be guilty of felony, and being convicted thereof, shall suffer death as a felon.”

The fifth section enacts, “that if any person shall unlawfully and maliciously set fire to any mine of coal or cannel coal, every such offender shall be guilty of felony, and, being convicted thereof, shall suffer death as a felon.”

S. 9. Setting
fire to or de-
stroying a
ship.

The ninth section enacts, “that if any person shall unlawfully and maliciously set fire to, or in any wise destroy any ship or vessel, whether the same be complete or in an unfinished state, or shall unlawfully and maliciously set fire to, cast away, or in any wise destroy any ship or vessel, with intent thereby to prejudice any owner or part-owner of such ship or vessel, or of any goods on board the same, or any person that hath underwritten or shall underwrite any policy of insurance upon such ship or vessel, or on the freight thereof, or upon any goods on board the same, every such offender shall be guilty of felony, and, being convicted thereof, shall suffer death as a felon.”

S. 17. Setting
fire to a stack
of corn, grain,
straw, hay,
&c., or to cer-
tain crops,
plantations,
and heath, &c.

The seventeenth section enacts, “that if any person shall unlawfully and maliciously set fire to any stack of corn, grain, pulse, straw, hay, or wood, every such offender shall be guilty of felony, and, being convicted thereof, shall suffer death as a felon; and if any person shall unlawfully and maliciously set fire to any crop of corn, grain, or pulse, whether standing or cut down, or to any part of a wood, coppice, or plantation of trees, or to any heath, gorze, furze, or fern, wheresoever the same may be growing, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years; and if a male, to be once, twice, or thrice publicly or privately whipped (if the Court shall so think fit), in addition to such imprisonment.”

12 Geo. 3. c.
24. s. 1., wil-
fully setting
on fire, &c.
ships of war,
arsenals, &c.
timber, &c. or
stores of war,
felony without
clergy.

The statute 12 Geo. 3. c. 24. s. 1. enacts, “That if any person or persons shall either within this realm, or in any of the islands, countries, forts or places thereunto belonging, wilfully and maliciously set on fire, or burn, or otherwise destroy, or cause to be set on fire, or burnt or otherwise destroyed, or aid, procure, abet or assist in the setting on fire, or burning or otherwise destroying of any of his Majesty’s ships or vessels of war, whether the said ships or vessels of war be on float or building, or begun to be built, in any of his Majesty’s dock-yards, or building or repairing by contract in any private yards, for the use of his Majesty, or any of his Majesty’s arsenals, magazines, dock-yards, rope-yards, victualling-offices, or any of the buildings erected therein, or belonging thereto; or any timber or materials there placed for building, repairing or fitting out of ships, or vessels; or any of his Majesty’s military, naval, or victualling stores, or other ammunition of war, or any place or places where any such military, naval or victualling stores, or other ammunition of war, is, are or shall be kept, placed or deposited; that then the person or persons guilty of any such offence,” being convicted, shall be adjudged guilty of felony, without benefit of clergy. By the second section of this act, any person who shall

commit any of the offences before-mentioned out of the realm, may be indicted and tried either in any county within the realm, or in such island or place where such offence shall have been actually committed, as his Majesty, his heirs, &c. may deem most expedient for bringing such offender to justice.

Trial in any county, place, &c.

By the articles of the navy, (22 Geo. 2. c. 33. art. 25.) every person who shall unlawfully burn or set fire to any magazine or store of powder, or ship, boat, ketch, hoy, or vessel, or tackle, or furniture thereunto belonging, not appertaining to an enemy or rebel, shall be punished with death, by the sentence of a court martial.

Article of the navy. Burning any ship, store of powder, &c. death.

The 39 Geo. 3. c. 69. a public local act, for rendering more commodious and for better regulating the port of *London*, enacts, (by s. 104.) "That if any person or persons whosoever shall will-fully and maliciously set on fire any of the works to be made by virtue of this act, or any ship or other vessel lying or being in the said canal, or in any of the docks, basons, cuts, or other works to be made by virtue of this act, every person so offending, in any of the said cases, shall be adjudged guilty of felony, without benefit of clergy."

39 Geo. 3. c. 69, (local act,) setting fire to works, ships, &c. in the port of *London*, felony without clergy.

By s. 25. of the 7 & 8 Geo. 4. c. 30. the punishments imposed by that act will equally apply whether the offence be committed from malice conceived against the owner of the property or otherwise. (d)

Malice against the owner not necessary.

It may be useful to mention some of the cases which occurred upon the statutes now repealed.

It appears to have been considered that the statute 9 Geo. 1. c. 22., did not alter the nature of the crime, or create any new offence, but only excluded the principal more clearly from his clergy. (e) The words "set fire to" in that statute did not, therefore, appear to admit of a larger construction than prevails by the rule of the common law; (f) by which, as we have seen, the putting fire into or towards a house, however maliciously, does not amount to arson, if either by accident or timely prevention no part of it be burned. (g) So that where the prisoner was indicted on that statute for setting fire to an outhouse, commonly called a paper mill, and it appeared that she had set fire to a large quantity of paper, which was drying in a loft annexed and belonging to the mill, but no part of the mill itself was consumed, the Judges thought the case not within the statute on that ground. (h) The setting fire to a *parcel* of unthreshed wheat was holden not to be felony within that statute; and where the offence was so described in a warrant of commitment, the court of King's Bench bailed the defendant. (i)

Cases upon the statutes now repealed.

A common *gaol* was holden to be a house within the statute 9 Geo. 1. c. 22. The indictment against the prisoner charged him in one of the counts with setting fire to the house of the corporation of *Liverpool*; in another, with setting fire to the house of

A common *gaol* holden to be a house within the 9 Geo. 1. c. 22. now repealed.

(d) *Ante*, p. 484.

(e) *Breeme's case*, 1780. 1 Leach 220. 2 East. P. C. c. 21. s. 6. p. 1026. Clergy was previously holden to be ousted only by inference and deduction from the statute 4 and 5 Ph. &

M. c. 4.

(f) 2 East. P. C. c. 21. s. 4. p. 1020.

(g) *Ante*, 486.

(h) *Taylor's case*, 1760, 1 Leach 49. 2 East. P. C. c. 21. s. 4. p. 1020.

(i) *Judd's case*, 2 T. R. 255.

one Richard Rigby; and in a third, with setting fire to the house of one Hannah Kerby. Upon the evidence it appeared that the place where the offence was committed was a gaol belonging to the corporation of Liverpool, which was used as the place of confinement both for criminals and debtors; that the prisoner, being confined there for debt, voluntarily set fire to his box, which was a little apartment in the prison; and that the whole gaol would, in consequence, have been probably burnt to the ground, but for timely assistance. The Richard Rigby mentioned in the indictment was the keeper of the gaol; and it appeared that his dwelling-house adjoined to the gaol, and was inhabited by himself and by Hannah Kerby, who was his mother-in-law, and who lived there by his permission, and kept it as a public-house. A wall separated the prison from the house; but the entrance into the prison was from the dwelling-house, by a door through the wall. This door was locked every night, and nobody inhabited the prison itself but the prisoners; some of whom were occasionally supplied with beds in the dwelling-house. The prisoner having been convicted, the case was submitted to the consideration of the Judges, who were of opinion that it was fully within the act; the dwelling-house being to be considered as a part of the prison, and the whole prison being the house of the corporation. (j)

As to an "out-house," within the same statute.

In a case where the prisoner was indicted under the same statute 9 Geo. 1. c. 22. for setting fire to a "*certain out-house*," a point was made whether the building in question answered this description. It appeared that the prosecutor kept a public-house, and also carried on the business of a flax-dresser; and that the building set fire to by the prisoner consisted of a stable and a chamber over it, which was used by the prosecutor as a shop for keeping and dressing his flax; and that these buildings were situated in a yard at the back of the house, about four or five yards distant from it, the yard being inclosed on all sides, in one part by the house, in another part by a wall, in a third by a railing which separated it from a field, and in the remaining part by a hedge. It was objected on behalf of the prisoner, that this building was not an *out-house* within the statute. And that the statute applied only to out-houses which in contemplation of law were not part of the dwelling-house; and it was insisted that this was part of the dwelling-house, and that the indictment should have been for arson at common law. And the prisoner having been found guilty, the point was reserved for the opinion of the Judges who all (except Hotham, B., who was absent) agreed that the verdict was right. And it was observed, that though for some purposes this might be part of the dwelling-house; yet still it was in fact an out-house. (k)

(j) *Donnevan's case*, 1770, 2 Black. Rep. 682. 1 Leach. 69. 2 East. P. C. c. 21. s. 5. p. 1020. See a precedent of an indictment at common law for setting fire to a place of confinement in a borough, 2 Stark. Crim. Plead. 422.

(k) *North's case*, 1795, 2 East. P. C. c. 21. s. 5. p. 1021. In the discussion

before the Judges, 3 Inst. 67. was referred to, where it was laid down, that to burn a stable and the like parcel of the mansion-house is felony; but that in the indictment it is sufficient to say *domum*, viz. a barn, malt-house, or the like, without saying *mansionalem*. *Ante*, 488.

In a subsequent case, the prisoner, Jacob Winter, was convicted upon an indictment consisting of several counts, some of which charged him with burning "a certain out-house" of one Thomas Rogers; and others with burning "a certain house" of the said Rogers; and some of the counts were at common law, others being laid against the form of the statute. It appeared, that the premises burnt consisted of a school-room, which was situated very near to the house in which Rogers lived, being separated from it only by a narrow passage about a yard wide. The roof of the house, which was of tile, reached over part of the roof of the school, which was thatched with straw; and the school with a garden and other premises, together with a court which surrounded the whole, were rented by Rogers of the parish, at a yearly rent. There was a continued fence round all the premises, and nobody but Rogers and his family had a right to come within it. Upon these facts it was urged, on behalf of the prisoner, that the building burnt was not a house nor an out-house within the statute 9 Geo. 1. c. 22. But the point being referred to the consideration of the Judges, they were of opinion that the building was correctly described in the indictment either as an out-house or part of the dwelling-house within the meaning of that statute. (*l*)

A school-room holden to be well described either as an out-house, or part of the dwelling-house.

In the course of the trial of an indictment upon the statute 9 Geo. 3. c. 29. s. 2. now also repealed, which related to the burning of *mills*, it was objected that a *cotton* mill was not within the meaning of that statute: but the objection was over-ruled. (*m*)

Cotton-mill within 9 Geo. 3. c. 29. s. 2.

In a case in which the construction of the statute 43 Geo. 3. c. 58. now repealed, came under consideration, it was decided that the "intent to injure" mentioned in that statute, must be inferred where injury was the necessary consequence of the setting fire to the premises, on the ground that a man must be supposed to intend the necessary consequence of his own acts. The indictment was for setting fire to a mill with intent to injure the occupiers thereof, and a point was reserved whether under 43 Geo. 3. c. 58. it was not necessary to give some evidence of an intent to injure beyond the mere act of setting fire, upon which the Judges were unanimous that the party must be taken to have intended what was the necessary consequence of his act. (*n*)

Farrington's case. As to the intent to injure or defraud under the 43 Geo. 3. c. 58.

With respect to the indictment, it may be observed, that it is clearly necessary in an indictment for arson at common law to lay the offence to have been done *wilfully* and *maliciously*: (*o*) and though the words *wilful* and *malicious* did not occur in the statute

Of the indictment.

(*l*) Winter's case, *cor.* Richards, B., Reading Lent Ass. 1815, East. T. 1815, Russ. & Ry. 295.

(*m*) Anon. Lancaster special session, May 1812. 2 Stark. Crim. Plead. 490.

(*n*) Rex v. Farrington, Mich. T. 1811, MS. Bayley, J., and Russ. & Ry. 207. The case occurred in Staffordshire, and at the Lent Assizes for that county in 1812, the opinion of the Judges was delivered by Graham, B., when sentence of death was ac-

cordingly passed upon the prisoner, but he afterwards received a pardon, on condition of his being imprisoned for a year, and kept to hard labour in the house of correction.

(*o*) 2 East. P. C. c. 21. s. 11. p. 1039. *Ante* 486. In Cox's case, 1 Leach 71. it was holden, upon an indictment for perjury at common law, that the words "falsely, maliciously, wickedly, and corruptly," implied that the offence was committed wilfully.

9 Geo. 1. c. 22. now repealed, yet they seem to have been considered as necessary in an indictment upon that statute.(p)

It was holden not to be necessary to allege the burning of a *dwelling-house*: and that the burning of a *house* only was a sufficient statement.(q) And where an indictment on the same repealed statute stated the burning to be of *out-houses* generally, without specifying their denomination, it was holden good.(r) And we have just seen that it was holden to be sufficient, in an indictment upon that statute, to state the burning of an *out-house*, if it were such in fact, though, in point of law it was parcel of the dwelling-house as being within the curtilage.(s) Where the indictment was for setting fire to a hay-stack upon the same statute, it was decided that it was not necessary to aver that the stack was thereby burnt; that not being requisite to the completion of the offence.(t)

It is material in an indictment at common law that the ownership of the house should be correctly stated so as to shew it to be the house of *another* within the principles mentioned in an early part of this chapter.(u) And stating that the prisoner set fire to a house at, &c., without stating whose house it was, or alleging any thing to excuse that statement will not be sufficient. An indictment charged that the prisoner feloniously set fire to a house situated in the parish of E., and it was holden to be bad.(x) The facts were that the house belonged to a parish, and the parish permitted a person to live in it who was merely a servant of the parish, and it was wholly unknown who were the trustees, or in whom the legal estate was vested; and it appears to have been holden by the Judges, that such house might have been laid to be the property of the overseers or of persons unknown.(y) In an indictment upon the 7 & 8 Geo. 4. c. 30. s. 2. it is as we have seen, by the words of the statute, sufficient to shew the house, &c to be in the possession of the offender, or in the possession of any other person. With respect to the nature of the possession it appears from a recent case that a house, in part of which a man lives, and other parts of which he lets to lodgers, may be described as his house, though he has taken the benefit of the insolvent debtor's act, and executed an assignment including the house, if the assignee has not taken possession: or at least no objection can be made if in other counts it is stated as the house of the assignee and also of the lodger whose room was set fire to. The indictment described the house first as Fearn's, secondly as Dance's, and thirdly as the prisoner's. Fearn occupied part of it and let out the rest in lodgings; the room set fire to being let to the prisoner; five months before the fire Fearn was discharged as an insolvent debtor, and had previously executed an assignment, including this house, to Dance; Dance never took possession. A

(p) Minton's case, 2 East. P. C. c. 21. s. 5. p. 1033.

(q) 3 Inst. 67. 1 Hale 567. Sum. 86. 1 Hawk. P. C. c. 39. s. 1. *Ante* 492, note (k).

(r) Glandfield's case, 2 East. P. C. c. 21. s. 11. p. 1033, 1034.

(s) North's case, *ante*, 492.

(t) Rex v. Salmon, East. T. 1802, MS. Bayley, J., and Russ. & Ry. 26.

(u) *Ante*, 487, *et sequ.*

(x) Rickman's case, 1789. 2 East. P. C. c. 21. s. 11. p. 1034. MS. Bayley, J.

(y) 2 East. P. C. *Ibid.*

case was reserved upon the point whether the possession of the house was rightly described, and the Judges held that it was: for the whole house was properly in the possession of Fearne, the possession by his tenants being his possession; and if not, the prisoner's own room might be deemed his house. (z)

It has been observed, that it requires great nicety in some cases to distinguish the person who may be said to occupy property *suo jure*: (a) and it will in some cases be advisable to state the ownership or possession differently, in different counts, in order to obviate any objection on the ground of variance. In a case where the indictment laid the whole of the premises consumed by the fire as in the sole occupation of one B. Silk, widow, it appeared that the premises burned, consisting of out-houses, were the property of the widow, but were only made use of by her son, who lived with her after his father's death in the dwelling-house adjoining the out-houses, and took upon him the sole management of the farm, with which these out-houses were used, to the loss and profit of which he alone stood, though without any particular agreement between him and his mother, and he paid all the servants, and purchased all the stock; but the legal property both in the dwelling-house and farm, was in the mother, and she alone repaired the dwelling-house, and the out-houses in question; and the indictment in this form was holden to be improper. And Heath, J., held, that as to the stable, pound, and hog-styes, which the son alone used, the indictment must lay them to be in his occupation; and as to the brew-house, (another of the out-houses burned,) the mother and son both occasionally paying for ingredients, the beer being used in the family, to the expences of which the mother in part contributed, though without any particular agreement as to the proportion, that the same should be laid as in their joint occupation. The prisoner was afterwards convicted on a second indictment, drawn agreeably to this opinion, and containing two counts; the first laying the occupation in the son alone, the other laying it in the mother and son; and he was executed. (b)

The general provisions of the statute 7 Geo. 4. c. 64. as to the statement of the ownership of partners, joint-tenants, &c., and the ownership of property belonging to counties, parishes, &c., will apply to prosecutions for offences now under consideration. (c)

Ownership of the property of partners joint-tenants, &c.

In a case where the prisoners were charged with setting fire to a house, the proof adduced by the first witness of their having been present in the house and implicated in the fact was that a bed and blankets, which had been taken out of the house at the time it was fired, and concealed by them from that time, were afterwards found in their possession; and Buller, J., doubted at first whether such evidence of another felony could be admitted in support

Evidence.

(z) *Rex v. Ball*, Mich. T. 1824. MS. Bayley, J., and Ry. & Mood. Cr. C. 30.

(a) 2 East. P. C. c. 31. s. 11. p. 1034.

(b) *Glandfield's case*, cor. Heath, J., Exeter Spr. Ass. 1791. 2 East. P. C. c. 21. s. 11. p. 1034.

(c) See the statute s. 14. *et sequ.* *Addend.* to the 1st vol.

Policy of insurance.
Stamp.

of this charge. But as it seemed to be all one act, although the prisoners came twice to the house fired, which was adjoining to their own, he admitted this amongst other evidence. (*d*)

It was ruled upon an indictment for arson, that the books of an insurance company are not evidence of an insurance, unless notice has been given to produce the policy. (*e*) In a modern case of an indictment for feloniously setting fire to a house with intent to defraud an insurance company, a policy of insurance was given in evidence on the part of the prosecution, by which the prisoner's goods, in a house described in the policy, were insured against fire, and upon which a memorandum was indorsed stating that the goods insured had been removed from the house described in the policy to another house mentioned in the memorandum. In this house so mentioned in the memorandum the prisoner was charged with having committed the felony. The policy was properly stamped, but the memorandum had no stamp: and upon this circumstance, an objection was taken on behalf of the prisoner, that it was essentially necessary to shew, in support of the charge, that there subsisted a legal effective contract; and that, by the express provisions of the stamp acts, the memorandum in question not being stamped, could not be given in evidence, or be good or available in any manner whatever. The point being reserved for the consideration of the twelve Judges was argued before them; and the conviction was held to be wrong. (*f*)

Principals in the second degree and accessories.

Penalty on servants firing any house or out-house through negligence.

The punishment of principals in the second degree and of accessories has been already mentioned amongst the general provisions of the recent statute 7 & 8 Geo. 4. c. 30. (*g*)

In conclusion of this chapter, it may be mentioned, that by the statutes 6 Ann. c. 31. s. 3. and 14 Geo. 3. c. 78. s. 84. if any menial or other servant, through negligence or carelessness, shall fire, or cause to be fired, any dwelling-house, or out-house, and be convicted thereof, by oath of one witness before two justices, he shall forfeit 100*l.* to the churchwardens, to be distributed amongst the sufferers by such fire; and if he shall not pay the same immediately, on demand of the churchwardens, he shall be committed by the justices to some work-house, or common gaol, or house of correction, for eighteen months, there to be kept to hard labour.

(*d*) Rickman's case, 1789. 2 East. P. C. c. 21. s. 11. p. 1035.

(*e*) Rex v. Doran, *cor.* Kenyon, C. J., 1 Esp. 127.

(*f*) Gilson's case, 1807, 2 Leach 1007. 1 Taunt. 95. Phil. on Evid.

457. Russ. & Ry. 138. But there was considerable difference of opinion, the conviction being held wrong by six Judges only against five, who were of a contrary opinion.

(*g*) *Ante*, p. 484.

CHAPTER THE FORTY-THIRD.

OF MAIMING AND KILLING CATTLE.

It has been holden that no indictment lies at common law for unlawfully with force and arms maiming a horse. In a case where the indictment charged that the prisoner, on, &c. with force and arms at, &c. "one black gelding of the value of 30*l.* of the goods " and chattels of one William Collyer, then and there being, then " and there unlawfully did maim, to the great damage of Collyer, " and against the peace, &c." upon reference to the Judges after conviction, they all held that no indictable offence was stated in the indictment; that if the case were not within the black act, 9 Geo. 1. c. 22., now repealed, the fact itself was only a trespass; and that the words *vi et armis* did not imply force sufficient to support an indictment. (a)

No indictment lies at common law for unlawfully *vi et armis* maiming a horse.

The 9 Geo. 1. c. 22. (commonly called the Black Act) was for a considerable time the principal statute upon the offence of maliciously maiming and killing cattle. But the clause in that statute relating to offences of this description was repealed by the 4 Geo. 4. c. 54. by which a lesser degree of punishment was provided for such offences, and the enactment of the statute 9 Geo. 1. was made somewhat more general. The latter, however, having been repealed by the 7 & 8 Geo. 4. c. 27. the statute upon this subject at the present time is the 7 & 8 Geo. 4. c. 30.

Statutes.

This statute, by the sixteenth section, enacts, "that if any person shall unlawfully and maliciously kill, maim, or wound any " cattle, every such offender shall be guilty of felony, and being " convicted thereof, shall be liable at the discretion of the Court, " to be transported beyond the seas for life, or for any term not " less than seven years, or to be imprisoned for any term not exceeding four years; and, if a male, to be once, twice, or thrice " publicly or privately whipped, (if the Court shall so think fit) in " addition to such imprisonment."

7 & 8 Geo. 4. c. 30. s. 16.

As this statute relates to the offence of maiming, &c. "cattle" in general, it may be proper to introduce some of the cases in which the meaning of that word in the repealed clause of the 9 Geo. 1. c. 22. became the subject of decision.

As to the meaning of the word "cattle" in the repealed clause of the act of 9 Geo. 1. c. 22.

(a) *Ranger's case*, 1798, 2 East. P. C. c. 22. s. 16. p. 1074.

The statute 9 Geo. 1. c. 22. was considered as extending, and not as abridging, the offences described in the 22 & 23 Car. 2. c. 7. In a case where the prisoner had been convicted on an indictment framed on the 9 Geo. 1. c. 22. for killing a mare and a colt, it was moved in arrest of judgment; first, that the mare and colt were not averred in the indictment to be cattle within the meaning of the act; and, secondly, that the word *cattle* did not necessarily include *horses*, *mares*, and *colts*. In support of these objections, several statutes were cited, in which different sorts of animals were particularly specified, (b) and several others in which "horses" and "horses and mares" seemed to be contradistinguished from and not included in the word "cattle." (c) But the Judges agreed unanimously that as the statute 22 & 23 Car. 2. c. 7. had made the offence of killing horses by night a single felony, the statute 9 Geo. 1. c. 22. was only to be considered as an extension of that act; and some precedents of capital convictions were cited upon this branch of the statute, though none of executions. It was, therefore, agreed that judgment of death should be given against the prisoner at the next assizes. (d) This point received a similar determination in subsequent cases. (e) And it is observed that it is plain that the legislature must have intended to include *horses* in the word "*cattle*," when in the statute of Car. 2. they speak of "horses, sheep, or *other cattle*;" and by the statute of George the First they exclude from clergy such as kill, &c., *any cattle*: which latter statute was evidently intended to enlarge, and not to restrain, the description of the felony. (f) It was subsequently decided that pigs were cattle within this act of 9 Geo. 1. Upon a conviction for poisoning pigs, the point was saved, whether pigs were cattle within the act, and the Judges held that they were. (g) The same decision more recently took place with respect to *asses*. The prisoner was convicted under the act of maiming and wounding two asses, and Richards, C. B., saved the point whether asses were within that act: and upon the case reserved, the Judges, (eleven being present) held that they were. (h)

As to the degree of "*maiming*," &c. under the 9 Geo. 1. c. 22.

It was also held upon the 9 Geo. 1. c. 22., that the repealed clause extended to such as should maim or wound any cattle, though the cattle were not destroyed, which by the 22 & 23 Car. 2. c. 7. was left a misdemeanor at most, punishable only by action to recover treble damages. It was decided, therefore, upon the

(b) 3 & 4 Ed. 6. c. 19. 5 & 6 Ed. 6. c. 14. and 31 Geo. 2. c. 40. for regulating the sale of *cattle*.

(c) 12 Car. 2. c. 4. (book of rates) 22 Car. 2. c. 13. 14 Geo. 2. c. 6. 15 Geo. 2. c. 34. But see the observation in 2 East. P. C. c. 22. s. 18. p. 1075, that the argument from the statutes 14 & 15 Geo. 2. will lose much of its force from adverting to the preamble of the first of those statutes.

(d) Paty's case, *Abington* Sum. Ass. 1770. 2 Black. Rep. 721. 1 Leach 72. 2 East. P. C. c. 22. s. 18. p. 1074. At the next assizes the prisoner was

reprieved for transportation; and afterwards (upon a strong application from the country) he received a free pardon.

(e) Mott's case, O. B. 1783. 1 Leach 73, note (a). Moyle's case, *cor.* Buller, J., *Bedmin* Sum. Ass. 1791. 2 East. P. C. c. 22. s. 18. p. 1076.

(f) 2 East. P. C. c. 22. s. 18. p. 1076.

(g) *Rex v. Chapple*, Mich. T. 1804, MS. Bayley, J., and Russ. & Ry. 77.

(h) *Rex v. Whitney*, Hil. T. 1824, MS. Bayley, J., Ry. & Mood. C. C. R. 3.

statute 9 Geo. 1. c. 22., that the maiming or wounding need not be mortal ; and that the wounding need not even be such as to cause a permanent injury. Thus, upon an indictment which charged the prisoner, in one count, with maiming, and in another with wounding a gelding ; and, upon proof that he had maliciously, and with an intent to injure the prosecutor, driven a nail into the frog of the horse's foot, whereby the horse was rendered useless to the owner, and continued so at the time of the trial, but was stated to be likely to do well, and to be perfectly sound again in a short time, judgment was respited, after conviction, upon a doubt whether, as the horse was likely to recover, and as the wound was not a permanent injury, the offence was within the statute : but the Judges held the conviction right ; and considered the word " wound " in the statute 9 Geo. 1. to be used as contradistinguished from a permanent injury, such as maiming.⁽ⁱ⁾ The clause in the late act appears to admit of a similar construction.

Under the repealed clause of the 9 Geo. 1. c. 22., *malice* to the owner of the cattle was a necessary ingredient to constitute the offence there created, and numerous decisions took place as to the nature and proof of this malice, to which it is unnecessary to refer, as under the late statute the offence will be complete, whether it be committed from malice conceived against the owner or "*otherwise*."^(k)

Malice to the owner not necessary.

It should seem that the indictment upon the late statute ought, like an indictment upon the repealed clause of the 9 Geo. 1. c. 22., to specify the kind of cattle injured, and that such statement must be supported by the evidence. In an indictment upon the 9 Geo. 1. c. 22. the prisoner was charged with maliciously killing certain cattle, viz. a mare, and he was convicted, but upon referring to the evidence, it did not appear that there was any evidence of the sex of the animal killed. A case being reserved, the first question considered was, whether the allegation that the prisoner killed certain cattle, without specifying what, would have been sufficient, because then what was stated under the *videlicet* might be rejected, and the Judges thought that it would not have been sufficient, and they were clear that it was essential that some evidence should have been given that the animal was a mare.^(l)

Indictment and evidence.

Every principal in the second degree, and every accessory before the fact, is punishable in the same manner as the principal in the first degree ; and every accessory after the fact is liable to be imprisoned for any term not exceeding two years.^(m)

Principals in the second degree, and accessories.

(i) Haywood's case, 1801, 2 East. P. C. c. 22. s. 20. p. 1076. Russ. & Ry. 16.

(k) S. 25.

(l) *Rex v. Chalkley*, Decemb. 1813.

Russ. & Ry. 258.

(m) *Anie*, p. 484., where the other general provisions of the act are stated.

CHAPTER THE FORTY-FOURTH.

OF INJURING AND DESTROYING TREES, SHRUBS, OR UNDERWOOD.

Offences by former statutes.

OFFENCES of the kind mentioned in the title to this Chapter were treated only as trespasses and misdemeanors by several ancient statutes: they were afterwards made offences of the degree of felony; but all the statutes upon this subject were repealed by 7 & 8 Geo. 4. c. 27., and the present law is contained in 7 & 8 Geo. 4. c. 30.

7 & 8 Geo. 4. c. 30. s. 19. Destroying or damaging trees, shrubs, &c. growing in certain situations, shall be felony, if the value exceeds one pound;

The nineteenth section of this statute enacts, "that if any person shall unlawfully and maliciously cut, break, bark, root up, or otherwise destroy or damage the whole or any part of any tree, sapling, or shrub, or any underwood, respectively growing in any park, pleasure ground, garden, orchard, or avenue, or in any ground adjoining or belonging to any dwelling-house, every such offender (in case the amount of the injury done shall exceed the sum of one pound) shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years, and if a male, to be once, twice, or thrice publicly or privately whipped (if the Court shall so think fit), in addition to such imprisonment; and if any person shall unlawfully and maliciously cut, break, bark, root up, or otherwise destroy or damage the whole or any part of any tree, sapling, or shrub, or any underwood, respectively growing elsewhere than in any of the situations hereinbefore mentioned, every such offender (in case the amount of the injury done shall exceed the sum of five pounds) shall be guilty of felony, and being convicted thereof, shall be liable to any of the punishments which the Court may award for the felony hereinbefore last mentioned."

the like to trees, shrubs, &c. growing elsewhere shall be felony, if the value exceeds five pounds.

Destroying or damaging trees, shrubs, &c. wheresoever growing, and of any value above one shilling, pu-

The twentieth section enacts, "that if any person shall unlawfully and maliciously cut, break, bark, root up, or otherwise destroy or damage the whole or any part of any tree, sapling, or shrub, or any underwood, wheresoever the same may be respectively growing, the injury done being to the amount of one shilling at the least, every such offender, being convicted before

" a justice of the peace, shall for the first offence forfeit and pay
 " over and above the amount of the injury done, such sum of mo-
 " ney, not exceeding five pounds, as to the Justice shall seem
 " meet; and if any person so convicted shall afterwards be guilty
 " of any of the said offences, and shall be convicted thereof in
 " like manner, every such offender shall for such second offence
 " be committed to the common gaol or house of correction, there
 " to be kept to hard labour for such term, not exceeding twelve
 " calendar months, as the convicting Justice shall think fit; and
 " if such second conviction shall take place before two Justices,
 " they may further order the offender, if a male, to be once or
 " twice publicly or privately whipped, after the expiration of four
 " days from the time of such conviction; and if any person so
 " twice convicted shall afterwards commit any of the said of-
 " fences, such offender shall be deemed guilty of felony, and,
 " being convicted thereof, shall be liable to any of the punish-
 " ments which the Court may award for the felony hereinbefore
 " last mentioned."

punishable on
 summary con-
 viction, for
 first and se-
 cond offence,
 third offence
 felony.

The statute also contains provisions as to principals in the se-
 cond degree, as to accessories, and as to abettors in misde-
 meanors; and also as to the prosecution of persons punishable
 upon summary conviction.(a)

The destruction of a wood, coppice, &c. by fire has been men-
 tioned in a former Chapter.(b)

(a) *Ante*, p. 484. And see the sta-
 tute in the *Addend.* to this Volume.

(b) *Ante*, p. 490.

CHAPTER THE FORTY-FIFTH.

OF DESTROYING, &c. PLANTS, ROOTS, FRUITS, AND VEGETABLE PRODUCTIONS.

Destroying,
&c. any fruit
or vegetable
production in
a garden, &c.
punishable on
summary con-
viction for first
offence; se-
cond offence
felony.

THE 7 & 8 Geo. 4. c. 30. s. 21. enacts, "that if any person shall unlawfully and maliciously destroy, or damage with intent to destroy, any plant, root, fruit, or vegetable production, growing in any garden, orchard, nursery ground, hot-house, green-house, or conservatory, every such offender, being convicted thereof before a justice of the peace, shall, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, for any term not exceeding six calendar months, or else shall forfeit and pay over and above the amount of the injury done, such sum of money, not exceeding twenty pounds, as to the justice shall seem meet; and if any person so convicted shall afterwards commit any of the said offences, such offender shall be deemed guilty of felony, and, being convicted thereof, shall be liable to any of the punishments which the Court may award for the felony hereinbefore last mentioned."

Destroying,
&c. vegetable
productions
not growing in
gardens, &c.

The 22d section enacts, "that if any person shall unlawfully and maliciously destroy, or damage with intent to destroy, any cultivated root or plant used for the food of man or beast, or for medicine, or for distilling, or for dyeing, or for or in the course of any manufacture, and growing in any land, open or inclosed, not being a garden, orchard, or nursery ground, every such offender being convicted thereof before a justice of the peace, shall, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, for any term not exceeding one calendar month, or else shall forfeit and pay, over and above the amount of the injury done, such sum of money, not exceeding twenty shillings, as to the justice shall seem meet, and in default of payment thereof, together with the costs, if ordered, shall be committed as aforesaid for any term not exceeding one calendar month, unless payment be sooner made; and if any person so convicted shall afterwards be guilty of any of the said offences, and shall be

“ convicted thereof in like manner, every such offender shall be
“ committed to the common gaol or house of correction, there to
“ be kept to hard labour for such term, not exceeding six calendar
“ months, as the convicting justice shall think fit; and if such
“ subsequent conviction shall take place before two justices, they
“ may further order the offender, if a male, to be once or twice
“ publicly or privately whipped, after the expiration of four days
“ from the time of such conviction.”

CHAPTER THE FORTY-SIXTH.

OF CUTTING AND DESTROYING HOP-BINDS.

Destroying
hop-binds
punishable by
transporta-
tion, &c.

THE statute 7 & 8 Geo. 4. c. 30. s. 18. enacts, "that if any person
" shall unlawfully and maliciously cut or otherwise destroy any
" hop-binds growing on poles in any plantation of hops, every
" such offender shall be guilty of felony, and being convicted
" thereof, shall be liable, at the discretion of the Court, to be
" transported beyond the seas for life, or for any term not less
" than seven years, or to be imprisoned for any term not exceed-
" ing four years; and, if a male, to be once, twice, or thrice pub-
" licly or privately whipped, (if the Court shall so think fit,) in
" addition to such imprisonment."

CHAPTER THE FORTY-SEVENTH.

OF BREAKING DOWN, &c. SEA BANKS, LOCKS, AND WORKS ON RIVERS, CANALS, &c.

THE statute 7 & 8 Geo. 4. c. 30. s. 12. enacts, "that if any person shall unlawfully and maliciously break down or cut down any sea bank or sea wall, or the bank or wall of any river, canal, or marsh, whereby any lands shall be overflowed or damaged, or shall be in danger of being so, or shall unlawfully and maliciously throw down, level, or otherwise destroy any lock, sluice, floodgate, or other work on any navigable river or canal, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years; and, if a male, to be once, twice, or thrice publicly or privately whipped, (if the Court shall so think fit,) in addition to such imprisonment; and if any person shall unlawfully and maliciously cut off, draw up, or remove any piles, chalk, or other materials fixed in the ground, and used for securing any sea bank, or sea wall, or the bank or wall of any river, canal, or marsh, or shall unlawfully and maliciously open or draw up any floodgate, or do any other injury or mischief to any navigable river or canal, with intent and so as thereby to obstruct or prevent the carrying on, completing, or maintaining the navigation thereof, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years; and, if a male, to be once, twice, or thrice publicly or privately whipped, (if the Court shall so think fit,) in addition to such imprisonment."

Destroying
any sea bank,
&c. or works
on any river
or canal.

Removing the
piles of any sea
bank, &c. or
doing any da-
mage to ob-
struct the na-
vigation of a
river or canal.

CHAPTER THE FORTY-EIGHTH.

OF DESTROYING THE DAMS OF FISH-PONDS, &c. OR MILL-PONDS, AND OF PUTTING NOXIOUS MATERIALS INTO FISH-PONDS, &c.

Breaking
down the dam
of a fishery,
&c. or mill
dam.

THE statute 7 & 8 Geo. 4. c. 30. s. 15. enacts, " that if any person shall unlawfully and maliciously break down, or otherwise
" destroy the dam of any fish-pond, or of any water which shall
" be private property, or in which there shall be any private
" right of fishery, with intent thereby to take or destroy any of
" the fish in such pond or water, or so as thereby to cause the
" loss or destruction of any of the fish, or shall unlawfully and
" maliciously put any lime or other noxious material in any such
" pond or water, with intent thereby to destroy any of the fish
" therein, or shall unlawfully and maliciously break down or
" otherwise destroy the dam of any mill-pond, every such offender
" shall be guilty of a misdemeanor, and, being convicted thereof,
" shall be liable, at the discretion of the court, to be transported
" beyond the seas for the term of seven years, or to be imprisoned
" for any term not exceeding two years ; and, if a male, to be
" once, twice, or thrice publicly or privately whipped (if the
" Court shall so think fit), in addition to such imprisonment."

CHAPTER THE FORTY-NINTH.

OF DESTROYING OR INJURING BRIDGES, TURNPIKE-GATES, &c.

THE statute 7 & 8 Geo. 4. c. 30. s. 13. enacts, "that if any person shall unlawfully and maliciously pull down or in any wise destroy any public bridge, or do any injury with intent and so as thereby to render such bridge or any part thereof dangerous or impassable, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years; and, if a male, to be once, twice, or thrice publicly or privately whipped (if the Court shall so think fit), in addition to such imprisonment."

Injury to a public bridge.

The fourteenth section enacts, "that if any person shall unlawfully and maliciously throw down, level, or otherwise destroy, in whole or in part, any turnpike-gate, or any wall, chain, rail, post, bar, or other fence belonging to any turnpike-gate, or set up or erected to prevent passengers passing by without paying any toll directed to be paid by any act or acts of parliament relating thereto, or any house, building, or weighing engine erected for the better collection, ascertainment, or security of any such toll, every such offender shall be guilty of a misdemeanor, and, being convicted thereof, shall be punished accordingly."

Destroying a turnpike-gate, toll-house, &c.

The malicious destruction or damaging of *public bridges* is said to be without doubt punishable as a misdemeanor at common law, being a nuisance to all the king's subjects. (a) But in a case of slight damage this might perhaps be questioned. With respect to wilful damage done to bridges, arches, walls, &c. erected by the commissioners of turnpike roads, pecuniary penalties, recoverable by summary conviction, are imposed by 3 Geo. 4. c. 126. s. 121. and 4 Geo. 4. c. 95. s. 72.

Destruction or damaging of bridges.

There are, however, a great number of bridges within this kingdom which it was made felony to injure or destroy, by the enactments of particular statutes. In some instances the offence was

(a) 2 East. P. C. c. 22. s. 27. p. 1081.

made capital, as in the case of *Westminster* bridge, by 9 Geo. 2. c. 29. s. 5. But a recent statute 1 Geo. 4. c. 116. repeals this provision of the *Westminster* bridge act and with respect to similar provisions in other statutes it enacts "that such parts of all former
"acts relating to bridges as enact that if any person or persons
"shall wilfully and maliciously blow up, pull down, or destroy
"any bridge, or any part thereof, or attempt so to do, or unlaw-
"fully and without authority remove or take any works thereto
"belonging, or in any wise direct or procure the same to be done,
"such offender or offenders, being thereof lawfully convicted, shall
"be adjudged guilty of felony, and shall suffer death as a felon,
"without benefit of clergy, shall from and after the passing of
"this act be and the same are hereby repealed."

CHAPTER THE FIFTIETH.

OF DESTROYING FENCES, WALLS, STILES, OR GATES.

The statute 7 & 8 Geo. 4. c. 30. s. 23., enacts, “ that if any person shall unlawfully and maliciously cut, break, throw down, or in any wise destroy any fence of any description whatsoever, or any wall, stile, or gate, or any part thereof respectively, every such offender, being convicted before a justice of the peace, shall for the first offence forfeit and pay, over and above the amount of the injury done, such sum of money, not exceeding five pounds, as to the justice shall seem meet ; and if any person so convicted shall afterwards be guilty of any of the said offences, and shall be convicted thereof in like manner, every such offender shall be committed to the common gaol or house of correction there to be kept to hard labour for such term, not exceeding twelve calendar months, as the convicting justice shall think fit ; and if such subsequent conviction shall take place before two justices, they may further order the offender, if a male, to be once or twice publicly or privately whipped after the expiration of four days from the time of such conviction.”

Destroying,
&c. any fence,
wall, stile, or
gate.

CHAPTER THE FIFTY-FIRST.

OF THE DESTROYING AND DAMAGING MINES AND MINE- ENGINES.

THE offence of setting fire to any coal-mine has been mentioned in a former chapter. (a)

7 & 8 Geo. 4.
c. 30. s. 6.
Drowning any
mine or filling
up any shaft,
&c. with intent
to destroy the
mine.

The statute 7 & 8 Geo. 4. c. 30. s. 6., enacts, "that if any person shall unlawfully and maliciously cause any water to be conveyed into any mine, or into any subterraneous passage communicating therewith, with intent thereby to destroy or damage such mine, or to hinder or delay the working thereof, or shall, with the like intent, unlawfully and maliciously pull down, fill up, or obstruct any air-way, water-way, drain, pit, level, or shaft, of or belonging to any mine, every such offender shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years; and if a male, to be once, twice, or thrice, publicly or privately whipped (if the court shall so think fit), in addition to such imprisonment: provided always, that this provision shall not extend to any damage committed under ground by any owner of any adjoining mine, in working the same, or by any person duly employed in such working."

S. 7. Destroy-
ing any engine,
erection, &c.
used in any
mine.

The 7th section enacts "that if any person shall unlawfully and maliciously pull down or destroy, or damage, with intent to destroy or to render useless, any steam-engine or other engine for sinking, draining, or working any mine, or any staith, building, or erection used in conducting the business of any mine, or any bridge, waggon-way, or trunk for conveying minerals from any mine, whether such engine, staith, building, erection, bridge, waggon-way, or trunk be completed or in an unfinished state, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable to any of the punishments which the court may award, as hereinbefore last mentioned."

(a) *Ante*, p. 490.

CHAPTER THE FIFTY-SECOND.

OF DESTROYING AND DAMAGING ARTICLES IN A COURSE OF MANUFACTURE, AND OF DESTROYING, &c. IMPLEMENTS AND MACHINERY.

THE statute 7 & 8 Geo. 4. c. 30. s. 3. enacts, "that if any person shall unlawfully and maliciously cut, break, or destroy, or damage with intent to destroy or to render useless, any goods or article of silk, woollen, linen, or cotton, or of any one or more of those materials mixed with each other, or mixed with any other material, or any framework-knitted piece, stocking, hose, or lace respectively, being in the loom or frame, or on any machine or engine, or on the rack or tenters, or in any stage, process, or progress of manufacture; or shall unlawfully and maliciously cut, break, or destroy, or damage with intent to destroy or render useless, any warp or shute of silk, woollen, linen, or cotton, or of any one or more of those materials mixed with each other, or mixed with any other material, or any loom, frame, machine, engine, rack, tackle, or implement, whether fixed or moveable, prepared for or employed in carding, spinning, throwing, weaving, fulling, shearing, or otherwise manufacturing or preparing any such goods or articles; or shall by force enter into any house, shop, building, or place, with intent to commit any of the offences aforesaid, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years; and, if a male, to be once, twice, or thrice publicly or privately whipped (if the Court shall so think fit), in addition to such imprisonment."

7 & 8 Geo. 4. c. 30. s. 3. Destroying silk, woollen, linen, or cotton goods in the loom, &c. or any machinery belonging to those manufactures, &c.

The fourth section enacts, "that if any person shall unlawfully and maliciously cut, break, or destroy, or damage, with intent to destroy or to render useless, any threshing machine, or any machine or engine, whether fixed or moveable, prepared for or employed in any manufacture whatever, (except the manufacture of silk, woollen, linen, or cotton goods, or goods of any one or more of those materials mixed with each other, or mixed with any other material, or any framework-knitted piece, stock-

S. 4. Destroying threshing machines, or machinery in any other manufacture than the foregoing.

“ing, hose, or lace) every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years; and, if a male, to be once, twice, or thrice publicly or privately whipped (if the Court shall so think fit), in addition to such imprisonment.”

S. 8. Rioters demolishing, &c. a church, chapel, house, or certain buildings, or any machinery in any manufactory or mine.

The eighth section enacts, “that if any persons, riotously and tumultuously assembled together to the disturbance of the public peace, shall unlawfully and with force demolish, pull down, or destroy, or begin to demolish, pull down, or destroy any church or chapel, or any chapel for the religious worship of persons dissenting from the united church of England and Ireland, duly registered or recorded, or any house, stable, coach-house, out-house, warehouse, office, shop, mill, malt-house, hop-oast, barn, or granary, or any building or erection used in carrying on any trade or manufacture, or any branch thereof, or any machinery, whether fixed or moveable, prepared for or employed in any manufacture, or in any branch thereof, or any steam-engine or other engine for sinking, draining, or working any mine, or any staith, building, or erection used in conducting the business of any mine, or any bridge, waggon-way, or trunk for conveying minerals from any mine, every such offender shall be guilty of felony, and, being convicted thereof, shall suffer death as a felon.”

CHAPTER THE FIFTY-THIRD.

OF DESTROYING AND DAMAGING SHIPS AND OTHER VESSELS,
AND ARTICLES THEREUNTO BELONGING.

THE offence of unlawfully and maliciously *setting fire* to ships and other vessels has been mentioned in a preceding Chapter. (a) The enactment there mentioned extends to other modes of destruction, and the statute in which it is contained, namely, the 7 & 8 Geo. 4. c. 30. contains several general provisions against the offences of maliciously damaging ships and other vessels, and doing certain acts tending to their immediate loss or destruction.

By the ninth section of that statute (which has been before mentioned) it is enacted, "that if any person shall unlawfully and maliciously set fire to, or in any wise destroy any ship or vessel, whether the same be complete or in an unfinished state, or shall unlawfully and maliciously set fire to, cast away, or in any wise destroy any ship or vessel, with intent thereby to prejudice any owner or part-owner of such ship or vessel, or of any goods on board the same, or any person that hath underwritten or shall underwrite any policy of insurance upon such ship or vessel, or on the freight thereof, or upon any goods on board the same, every such offender shall be guilty of felony, and, being convicted thereof, shall suffer death as a felon."

S. 9. Setting fire to, or destroying a ship.

The tenth section enacts, "that if any person shall unlawfully and maliciously damage, otherwise than by fire, any ship or vessel, whether complete or in an unfinished state, with intent to destroy the same, or to render the same useless, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years; and, if a male, to be once, twice, or thrice publicly or privately whipped (if the Court shall so think fit), in addition to such imprisonment."

S. 10. Damaging a ship, otherwise than by fire.

The eleventh section enacts, "that if any person shall exhibit any false light or signal with intent to bring any ship or vessel into danger, or shall unlawfully and maliciously do any thing tending to the immediate loss or destruction of any ship or ves-

S. 11. Exhibiting false signals to a ship, &c.; destroying a

(a) *Ante*, Chap. On Arson, &c. p. 490.

shipwrecked
vessel or
cargo.

12 Geo. 3. c.
24. Persons
wilfully de-
stroying ships
of war, arse-
nals, dock-
yards, &c. or
any timber,
&c. or stores,
guilty of fe-
lony without
clergy.

1 & 2 Geo. 4. c.
75. s. 11. cut-
ting away, de-
facing, &c.
buoys, buoy-
ropes, &c. fe-
lony, punish-
able by trans-
portation, &c.

"sel in distress, or destroy any part of any ship or vessel which
"shall be in distress, or wrecked, stranded, or cast on shore, or
"any goods, merchandize, or articles of any kind belonging to
"such ship or vessel, or shall by force prevent or impede any per-
"son endeavouring to save his life from such ship or vessel (whe-
"ther he shall be on board or shall have quitted the same), every
"such offender shall be guilty of felony, and, being convicted
"thereof, shall suffer death as a felon."

The statute 12 Geo. 3. c. 24. relates to the king's ships of war, arsenals, &c. and enacts, "that if any person or persons shall,
"either within this realm, or in any of the islands, countries, forts,
"or places thereunto belonging, wilfully and maliciously set on
"fire, or burn, or otherwise destroy, or cause to be set on fire, or
"burnt, or otherwise destroyed, or aid, procure, abet, or assist in
"the setting on fire, or burning or otherwise destroying of any of
"his Majesty's ships or vessels of war, whether the said ships or
"vessels of war be on float or building, or begun to be built, in
"any of his Majesty's dock-yards, or building or repairing by
"contract in any private yards, for the use of his Majesty, or any
"of his Majesty's arsenals, magazines, dock-yards, rope-yards,
"victualling offices, or any of the buildings erected therein, or
"belonging thereto; or any timber or materials there placed for
"building, repairing, or fitting out of ships or vessels; or any of
"his Majesty's military, naval, or victualling stores, or other am-
"munition of war, or any place or places where any such
"military, naval, or victualling stores, or other ammunition
"of war, is, are, or shall be kept, placed or deposited;" the
person or persons guilty of any such offence shall be adjudged
guilty of felony, and suffer death without benefit of clergy. By
the second section persons committing these offences out of the
realm may be indicted and tried for the same either in any county
within the realm, or in the place where the offence shall have been
actually committed, as his Majesty may deem most expedient for
bringing such offender to justice. (a)

The 1 & 2 Geo. 4. c. 75. s. 11. enacts "that if any person or
"persons shall wilfully cut away, cast adrift, remove, alter, deface,
"sink, or destroy, or shall do or commit any act with intent and
"design to cut away, cast adrift, remove, alter, deface, sink, or
"destroy, or in any other way injure or conceal any buoy, buoy-
"rope, or mark, belonging to any ship or vessel, or which may
"be attached to any anchor or cable belonging to any ship or
"vessel whatever, whether in distress or otherwise, such person
"or persons so offending shall, on being convicted of such offence,
"be deemed and adjudged to be guilty of felony, and shall be liable
"to be transported for any term not exceeding seven years, or, in

(a) Some offences of a similar nature may be inquired of and tried by courts martial by the naval articles of war, s. 24 and 25. as given in 22 Geo. 2. c. 33. And by the twenty-sixth article, "care shall be taken in the conducting and steering of any of his Majesty's ships, that through wilfulness, negligence, or other de-

"faults, no ship be stranded or run
"upon any rocks or sands, or split
"or hazarded, upon pain that such as
"shall be found guilty therein be
"punished by death, or such other
"punishment as the offence, by a
"court-martial, shall be judged to
"deserve."

"mitigation of such punishment, to be imprisoned for any number
"of years at the discretion of the Court in which the conviction
"shall be made."(b)

Besides the statutes which have been thus cited, there are some others of a more limited and local operation, which may be briefly noticed. The 2 Geo. 3. c. 28. s. 13. enacts, "that if any person or persons shall cut, damage or spoil any cordage, cable, buoys, buoy-rope, head-fast, or other fast, fixed to any anchor or moorings, belonging to any ship or vessel at anchor or moorings in the river *Thames*, or any rope used for the purpose of mooring or rafting masts or timber, or shall be aiding or assisting therein, with an intent to steal the same;" such person or persons being convicted on the oath of two witnesses shall be transported for seven years.(c) The 39 Geo. 3. c. 69. (a local act for improving the port of *London*.) s. 4. after providing as to the burning, &c. of ships therein mentioned, enacts, "that if any person or persons shall knowingly, wilfully or maliciously demolish, break down, cut or destroy any of the works to be made by virtue of this act, or any ship or vessel lying in the said canal, or in any of the said docks, basins, cuts, or other works; then every such offender, being convicted thereof, shall suffer punishment by fine, imprisonment or transportation, at the discretion of the Judge, &c. before whom such offender shall be tried and convicted." And by a subsequent section (s. 105.) persons wilfully or maliciously cutting, &c. or in any manner destroying any rope, &c. by which any ship or vessel lying in the said canal, docks, &c. or in any place or places in the river *Thames*, *between London bridge and the mouth of the river Lea*, are moored or fastened, shall forfeit not exceeding 10*l*. The 47 Geo. 3. sess. 2. c. 2. s. 57. (local act.) relates to the damaging, &c. of shipping, or goods, &c. in *Folkestone harbour*. The 1 & 2 Geo. 4. c. 76. relates to the jurisdiction of the *Cinque ports*, and the sixth section contains an enactment making the cutting away, defacing, &c. buoys, &c. a felony punishable by transportation in words similar to the 1 & 2 Geo. 4. c. 75. s. 11.(d)

Upon the words "cast away or destroy" it may be mentioned that upon the construction of those words in two statutes 4 Geo. 1. c. 12 and 11 Geo. 1. c. 29. (now repealed) it appears to have been ruled that if a ship were only run aground or stranded upon a rock, and were afterwards got off in a condition capable of being easily refitted, she could not be said to be *cast away or destroyed*, and that the case was not therefore within either of those statutes. (e)

(b) See various provisions of this act as to unlawfully receiving anchors, cables, &c. or goods obtained from ships, *ante*, p. 279. By s. 36., the act is not to extend to *Scotland* or *Ireland*: nor (by s. 23.) to affect the *Cinque port* act, 48 Geo. 3. c. 130. or the *Pilot* act, 48 Geo. 3. c. 104.

(c) It is observed that as this clause does not expressly declare the offend-

ers to be felons, there are grounds upon which it seems to rest in misdemeanor only. 2 East. P. C. c. 22. s. 44. p. 1102.

(d) *Ante*, 514, and see the act 1 & 2 Geo. 4. c. 76. as to other offences committed within this jurisdiction.

(e) *De Londo's case*, 1765. 2 East. P. C. c. 22. s. 42. p. 1098.

Statutes of a limited and local operation, 2 Geo. 3. c. 28. s. 13.

39 Geo. 3. c. 69.

47 Geo. 3. sess. 2. c. 2. s. 57.
1 & 2 Geo. 4. c. 76.

Words "cast
"away or de-
"stroy."

CHAPTER THE FIFTY-FOURTH.

OF WILFUL OR MALICIOUS DAMAGE TO REAL OR PERSONAL PROPERTY, NOT OTHERWISE PROVIDED FOR.

Persons committing damage to any property, in any case not previously provided for, may be compelled by a justice to pay compensation not exceeding five pounds,

Application of the money awarded.

Provide.

THE statute 7. and 8. Geo. 4. c. 30. s. 24. enacts "that if any
 " person shall willfully or maliciously commit any damage, injury,
 " or spoil to or upon any real or personal property whatsoever,
 " either of a public or private nature, for which no remedy or
 " punishment is hereinbefore provided, every such person, being
 " convicted thereof before a justice of the peace, shall forfeit and
 " pay such sum of money as shall appear to the justice to be a
 " reasonable compensation for the damage, injury, or spoil so com-
 " mitted, not exceeding the sum of five pounds; which sum of
 " money shall, in the case of private property, be paid to the
 " party aggrieved, except where such party shall have been exa-
 " mined in proof of the offence; and in such case, or in the
 " case of property of a public nature, or wherein any public
 " right is concerned, the money shall be applied in such manner
 " as every penalty imposed by a justice of the peace under this
 " act is hereinafter directed to be applied; and if such sum of
 " money, together with costs (if ordered,) shall not be paid either
 " immediately after the conviction, or within such period as the
 " justice shall at the time of the conviction appoint, the justice
 " may commit the offender to the common gaol or house of cor-
 " rection, there to be imprisoned only, or to be imprisoned and
 " kept to hard labour as the justice shall think fit, for any term
 " not exceeding two calendar months, unless such sum and costs
 " be sooner paid: provided always, that nothing herein contained
 " shall extend to any case where the party trespassing acted un-
 " der a fair and reasonable supposition that he had a right to do
 " the act complained of, nor to any trespass, not being wilful and
 " malicious, committed in hunting, fishing, or in the pursuit of
 " game, but that every such trespass shall be punishable in the
 " same manner as before the passing of this act."

BOOK THE FIFTH.

OF OFFENCES WHICH MAY AFFECT THE PERSONS OF INDIVIDUALS OR PROPERTY.

CHAPTER THE FIRST.

OF PERJURY AND SUBORNATION OF PERJURY.

PERJURY, by the common law, appears to be a wilful false oath by one who, being lawfully required to depose the truth in any proceeding in a court of justice, swears absolutely in a matter of some consequence to the point in question, whether he be believed or not. *(a)*

Perjury by the
common law.

Subornation of perjury by the common law is an offence in procuring a man to take a false oath amounting to perjury, who actually takes such oath. But it seems clear that if the person, incited to take such an oath, do not actually take it, the person by whom he was so incited is not guilty of subornation of perjury; yet it is certain that he is liable to be punished, not only by fine, but also by infamous corporal punishment. *(b)*

Subornation of
perjury by the
common law.

Inciting a witness to give *particular* evidence, where the inciter does not know whether it is true or false, is a high misdemeanor; especially, if the inciter being attorney on one side gets himself employed for that purpose by the other side: at least, if the evidence is given accordingly. The indictment charged that the defendant, an attorney, being retained to defend Wood against a charge of picking Lewis's pocket, deceitfully procured himself to be employed by Lewis, and persuaded Lewis to swear before the grand jury that he did not know who picked his pocket, which he did, and no bill was returned. An objection was made that Lewis's evidence was not stated to have been false; but, upon a case reserved, the Judges thought it unnecessary; as the defend-

(a) 1 Hawk. P. C. c. 69. s. 1. 3 Inst. 164. Com. Dig. Tit. Just. of Peace, B. 102. 5 Bac. Abr. *Perjury*. *(b)* 1 Hawk. P. C. c. 69. s. 10. 5 Bac. Ab. *Perjury*, and the authorities there cited.

ant's crime was the same, unless he knew it to be true, and *that* he should have proved.(c)

The false oath must be wilful, and taken with some degree of deliberation.

The false oath must be wilful, and taken with some degree of deliberation; for if upon the whole circumstances of the case it shall appear probable, that it was owing rather to the weakness than perverseness of the party, as where it was occasioned by surprize, or inadvertency, or a mistake of the true state of the question, it cannot but be hard to make it amount to voluntary and corrupt perjury, which is of all crimes whatsoever the most infamous and detestable.(d)

A man may be indicted for perjury in swearing that he believes a fact to be true.

It has been said that no oath will amount to perjury, unless it be sworn absolutely and directly, and, therefore, that he who swears a thing according as he *thinks, remembers, or believes*, cannot, in respect of such an oath, be found guilty of perjury.(e) But De Grey, *Ld. C. J.*, appears to have laid down a different doctrine.(f) And Lord Mansfield, *C. J.*, is stated to have said, "It is certainly true that a man may be indicted for perjury in "swearing that he *believes* a fact to be true which he must know "to be false." (g) It is further said that, upon this question being agitated in the Court of Common Pleas, all the Judges were unanimous that *belief* was to be considered as an absolute term, and that an indictment might be supported upon such a statement.(h) But it has been holden that perjury cannot be assigned upon an assertion the correctness of which depends upon the construction of a deed.(i)

The important requisites in a case of perjury appear to be these; *the false oath must be taken in a judicial proceeding, before a competent jurisdiction, and it must be material to the question depending.* (k)

The oath must be false.

With respect to the falsity of the oath it should be observed, that it has been considered not to be material whether the fact, which is sworn, be in itself true or false; for, howsoever the thing sworn may happen to prove agreeable to the truth, yet, if it were not known to be so by him who swears to it, his offence is altogether as great as if it had been false, inasmuch as he wilfully swears that he knows a thing to be true which at the same time he knows nothing of, and impudently endeavours to induce those before whom he swears to proceed upon the credit of a deposition which any stranger might take as well as he.(l)

The oath must be taken in a judicial proceeding.

The oath must be taken either in a judicial proceeding, or in some other public proceeding of the like nature, wherein the King's honour or interest are concerned; as, before commissioners appointed by the King to inquire of the forfeitures of his tenants, or

(c) *Rex v. Edwards*, *East. T. 1764*. MS. Bayley, J. And as to dissuading witnesses from giving evidence, see vol. i. p. 184.

(d) 1 *Hawk. P. C. c. 69. s. 2.*

(e) 3 *Inst. 166.*

(f) *Miller's case*, 3 *Wils. 427.* 3 *Black. Rep. 881.*

(g) *Pedley's case*, 1 *Leach 327.*

(h) *Anon. C. P. Mich. T. 1780.* 1 *Hawk. P. C. c. 69. s. 7. note (a), p. 88.*

(ed. 1795.)

(i) *Rex v. Crespigny, cor. Kenyon, C. J.* 1 *Esp. 280.*

(k) By Lord Mansfield, *C. J.*, in *Rex v. Aylett*, 1 *T. R. 69.*

(l) 1 *Hawk. P. C. c. 69. s. 6.* *Rex v. Edwards, cor. Adams, B., Shrewsbury Lent Ass. 1764*; and subsequently considered of by the Judges, MS. And see per Lawrence, J., in *Rex v. Mawbey and Others*, 6 *T. R. 619.*

of defective titles wanting the supply of the King's patents. But it is not material whether the court, in which a false oath is taken, be a court of record or not, or whether it be a court of common law, or a court of equity, or civil law, &c., or whether the oath be taken in the face of the Court, or out of it before persons authorized to examine a matter depending in it; as, before the sheriff on a writ of enquiry, &c.; or whether it be taken in relation to the merits of a cause, or in a collateral matter; as, where one who offers himself to be bail for another, swears that his substance is greater than it is. (m) But neither a false oath in a mere private matter, as in making a bargain, &c., nor the breach of a promissory oath, whether public or private, are punishable as perjury. (n)

In a case where perjury was assigned upon an affidavit of an attorney of the Court of King's Bench, made in answer to a charge exhibited against him in a summary way, for having in his possession blank pieces of paper with affidavit stamps, and the signatures of a master extraordinary in chancery and another person at the bottom of the papers, an objection was taken in arrest of judgment that the indictment did not shew that the affidavit of the defendant was made in any legal proceeding. It was urged that the Court had no right to call on the defendant summarily to answer any complaint against him merely because he was an attorney, unless in a case touching the defendant's office as an attorney, in his conduct towards some of the suitors of the court, or for a breach or contempt of some rule or order of the court, or for some matter touching the proceedings or process of the court, none of which were stated; or, if the paper found in the defendant's custody could have been the object of a summary inquiry, (not having been used or attempted so to be, nor having a proper stamp) it could only have been in the Court of Chancery, where the paper could have been used, if at all, and not in the Court of King's Bench, wherefore all the proceedings respecting it were *coram non judice*, and could not be the subject of an indictment for perjury. But this objection was afterwards abandoned. (o)

It has been doubted, whether a false oath taken in Doctors' Commons, for the purpose of obtaining a *marriage licence*, amounts to perjury. (p) And the same doubt was entertained in a subsequent case, where the defendant was indicted for perjury in an affidavit in Doctors' Commons, in order to obtain a licence to marry one C. Hill, spinster, to which he swore that he knew no lawful impediment, whereas in truth and in fact he knew she was the wife of another man. (q) And it has been lately decided that a

(m) 1 Hawk. P. C. c. 69. s. 3. 5 Bac. Abr. *Perjury*, (A).

(n) *Id. ibid.*

(o) *Rex v. Crossley*, 7 T. R. 317.

(p) *Alexander's case*, O. B. 1767. 1 Leach 63. The point was submitted to the consideration of the twelve Judges, and several times agitated; but the result was not communicated,

as the prisoner died in Newgate.

(q) *Woodman's case*, O. B. 1768. 1 Leach 64 note (a). The point appears to have been submitted also in this case to the consideration of the twelve Judges; but their opinion was not publicly communicated. In 3 Chit. Crim. L. 713. a precedent is given of an information by the Attorney-Ge-

false oath before a surrogate, taken in order to procure a marriage licence, will not support a prosecution for perjury: and further, that if the indictment only charges the taking the false oath without stating that it was for the purpose of procuring a licence, or that a licence was procured thereby, the party cannot be punished thereupon as for a misdemeanor. The indictment stated that the prisoner, being minded to procure a marriage between himself and A. B., went before a surrogate, and was sworn to an affidavit in writing, that the said A. B. had been residing four weeks in the parish of S., whereas she had not, and so he had committed perjury: and the indictment had all apt allegations of an indictment for perjury. But a case being reserved upon the question whether on such an affidavit the party could be prosecuted for perjury, and if not, whether upon this indictment any offence was charged, the Judges were unanimous that upon an oath before a surrogate, perjury could not be assigned; and that as this indictment did not charge that the defendant took the oath to procure a licence, or that he did procure one, no punishment could be inflicted; and he was therefore pardoned.^(r) It appears, however, from this case, that if the purpose of such an oath is to obtain a licence, and the licence is obtained, and marriage had, the party may be indicted as for a misdemeanor. The nature of the oath at present required to be taken before the surrogate is described in the statute 4 Geo. 4. c. 76. s. 14., and by section 23, of that statute, when a marriage has been effected between parties under age, contrary to the act, by means of a false oath or fraud, certain proceedings are given by which the guilty party may be made to forfeit all property accruing from the marriage.

As a suit will be abated by the death of a co-plaintiff, unless the death be suggested according to the statute 8 & 9 Wm. 3. c. 11. s. 6., it has been ruled that if a co-plaintiff die, after issue joined, a trial without such suggestion on the record would be *extra-judicial*, and that no perjury could be assigned upon any false evidence given at such trial.^(s)

And it must be taken before a competent jurisdiction.

The oath must be taken before a competent jurisdiction, that is, before some person or persons lawfully authorized to administer it. So that a false oath taken in a court of requests, in a matter concerning lands, has been holden not to be indictable, that court having no jurisdiction in such cases.^(t) And it seems clear, that no oath whatsoever taken before persons acting merely in a private capacity, or before those who take upon them to administer oaths of a public nature, without legal authority for their so doing, or before those who are legally authorized to administer some kinds of oaths, but not those which happen to be taken before them, or even before those who take upon them to administer justice by virtue of an authority seemingly colourable, but in truth unwarranted and merely void, can ever amount to perjuries in the eye

neral for a misdemeanor in procuring a marriage with a minor, by false allegations; and in the note (u), it is said, "It seems doubtful whether an indictment for perjury could have been supported in this case; but it

"seems most probable that it might." And 1 Leach 63. is referred to.

(r) *Rex v. Forster*, East. T. 1821, MS. Bayley, J., and Russ. & Ry. 459.

(s) *Rex v. Cohen*, 1 Stark. R. 511.

(t) *Baston v. Gouch*, 3 Salk. 269.

of the law, because they are of no manner of force, but are altogether idle.(u) But a false oath taken before commissioners whose commission at the time is in strictness determined by the demise of the king is perjury, if taken before such time as the commissioners had notice of the demise; for it would be of the utmost ill consequence in such case to make their proceedings wholly void.(x)

The oath must be material to the question depending: for if it be wholly foreign from the purpose, or altogether immaterial, and neither in any way pertinent to the matter in question, nor tending to aggravate or extenuate the damages, nor likely to induce the jury to give the readier credit to the substantial part of the evidence, it cannot amount to perjury, because it is wholly idle and insignificant; as, where a witness introduces his evidence, with an impertinent preamble of a story concerning previous facts, not at all relating to what is material, and is guilty of a falsity as to such facts.(y) And it appears to have been determined, that where a witness, being asked by a judge whether A. brought a certain number of sheep from one town to another all together, answered, that he did so, whereas in truth A. did not bring them all together, but part at one time and part at another, yet such witness was not guilty of perjury, because the substance of the question was, whether A. did bring them at all or not, and the manner of bringing them was only a circumstance. And that, upon the same ground, where a witness, being asked whether a particular sum of money were paid for two things in controversy between the parties, answered that it was, whereas, in truth, it was paid only for one of them by agreement, such witness ought not to be punished for perjury; because, as the case was, it was not material whether the sum were paid for one or both. And it is also said to have been resolved, that a witness who swore that a man drew his dagger, and beat and wounded J. S., whereas in truth he beat him with a staff, was not guilty of perjury, because the beating only was material.(z)

The oath must be material to the question depending.

But upon these decisions it is remarked, that perhaps in all these cases it ought to be intended, that the question was put in such a manner, that the witness might reasonably apprehend that the sole design of putting it was to be informed of the substantial part of it, which might induce him through inadvertency to take no notice of the circumstantial part, and give a general answer to the substantial; for otherwise, if it appear plainly that the scope of the question was to sift him as to his knowledge of the substance, by examining him strictly concerning the circumstances, and he give a particular and distinct account of the circumstances

(u) 1 Hawk. P. C. c. 69. s. 4. and the authorities there cited; and 4 Black. Com. 137. where it is said "it is much to be questioned how far any magistrate is justifiable in taking a voluntary affidavit in any extra-judicial matter, as is now too frequent upon every petty occasion, since it is more than possible, that by such idle oaths a man may fre-

quently *in foro conscientiae* incur the guilt, and at the same time evade the temporal penalties of perjury."

(x) 1 Hawk. P. C. c. 69. s. 4. 5 Bac. Ab. *Perjury*, (A).

(y) *Rex v. Griepe*, 1 Ld. Raym. 256. 5 Bac. Ab. *Perjury*, (A).

(z) 2 Roll. 41, 42, 369. Helt. 97. 1 Hawk. P. C. c. 69. s. 8.

which afterwards appears to be false; surely he cannot but be guilty of perjury, inasmuch as nothing can be more apt to incline a jury to give credit to the substantial part of a man's evidence, than his appearing to have an exact and particular knowledge of all the circumstances relating to it. (a) And it is spoken of as a reasonable opinion, that a witness may be guilty of perjury in respect of a false oath concerning a mere circumstance, if such oath have a plain tendency to corroborate the more material part of the evidence; as if, in trespass for spoiling the plaintiff's close with the defendant's sheep, a witness swears that he saw such a number of the defendant's sheep in the close; and being asked how he knew them to be the defendant's, swears that he knew them by such a mark, which he knew to be the defendant's mark, whereas, in truth, the defendant never used any such mark. (b) And it appears to have been holden not to be necessary that it should be shewn to what degree the point in which a man is perjured was material to the issue, and that it will be sufficient if the point were circumstantially material. (c) And still less is it necessary that the evidence be sufficient for the plaintiff to recover upon, since evidence may be very material, and yet not full enough to prove directly the point in question. (d) In a modern case where A. advanced money to B. on two distinct mortgages, upon one of which the security was insufficient, and B. assigned the equity of redemption in both to C., who assigned the insufficient estate to an insolvent, and filed a bill against A. to redeem the other, to which bill A. put in his answer, and therein denied having had notice of the assignment to the insolvent; it was holden that the notice was a material fact upon which perjury might be assigned. (e)

A man may be perjured by an oath taken in his own cause.

But a false verdict does not come under the notion of perjury.

It is not necessary that the false oath were credited.

False oath indictable in some cases,

It should be observed, that a man may be as much perjured by an oath taken by him in his own cause, either in an answer in Chancery, or in an answer to interrogatories concerning a contempt, or in an affidavit, &c. as by an oath taken by him as a witness in the cause of another person. (f) But the oath must be taken by a person sworn to depose the truth; and a false verdict does not come under the notion of perjury, because the jurors do not swear to depose the truth; but only to judge truly of the depositions of others. (g)

A further point of general application may be mentioned, namely, that it appears not to be important whether the false oath were credited or not, or whether the party in whose prejudice it was taken were in the event any ways damaged by it; for the prosecution is not grounded on the damage to the party, but on the abuse of public justice. (h)

In some cases, where a false oath has been taken, the party may be prosecuted by indictment at common law, though the

(a) 1 Hawk. P. C. c. 69. s. 8.
 (b) 5 Bac. Ab. *Perjury*, (A). 1 Hawk. P. C. c. 69. s. 8.
 (c) *Rex v. Grieppe*, 1 Ld. Raym. 258.
 (d) *Reg. v. Rhodes and Cole*, 2 Ld. Raym. 887.
 (e) *Rex v. Pepys, cor. Kenyon*, C.

J., Peake, N. P. R. 138.
 (f) 1 Hawk. P. C. c. 69. s. 5. 5 Bac. Ab. *Perjury* (A).
 (g) *Id. Ibid.*
 (h) 1 Hawk. P. C. c. 69. s. 9. 5 Bac. Ab. *Perjury* (A).

offence may not amount to perjury. Thus it appears to have been holden, that any person making or knowingly using any false affidavit taken abroad, (though a perjury could not be assigned on it here) in order to mislead our courts of justice is punishable by indictment as for a misdemeanor: and Lord Ellenborough, C. J., said, "that he had not the least doubt, that any person making use of a false instrument in order to prevent the course of justice was guilty of an offence punishable by indictment." (i)

though not assignable as perjury.

We may now proceed to consider the statute 5 Eliz. c. 9., and other statutes which relate to the offence of perjury.

Statutes relating to perjury.

The statute 5 Eliz. c. 9. (made perpetual by 29 Eliz. c. 5. s. 2., and 21 Jac. 1. c. 28. s. 8.) enacts (by s. 3.) "that all and every such person and persons which shall unlawfully and corruptly procure any witness or witnesses by letters, rewards, promises, or by any other sinister and unlawful labour or means whatsoever, to commit any wilful and corrupt perjury, in any matter or cause whatsoever now depending, or which hereafter shall depend in suit and variance, by any writ, action, bill, complaint, or information, in any wise touching or concerning any lands, tenements or hereditaments, or any goods, chattels, debts, or damages, in any of the courts before mentioned, (k) or in any of the queen's majesty's courts of record or any leet, view of frank-pledge or law-day, ancient demesne court, hundred court, court baron, or in the court or courts of the stannary in the counties of *Devon* and *Cornwall*: or shall likewise unlawfully and corruptly procure or suborn any witness or witnesses, which shall be sworn to testify *in perpetuam rei memoriam*; that then every such offender or offenders shall for his, her, or their said offence, being thereof lawfully convicted or attainted, lose and forfeit the sum of forty pounds."

5 Eliz. c. 9. s. 3. Procuring any witness to commit perjury in any matter in suit, by writ, &c. concerning any lands, goods, &c. or when sworn *in perpetuam rei memoriam* punishable by forfeiture of 40*l*.

The fourth section enacts, that "if it happen any such offender or offenders, so being convicted, or attainted as aforesaid, not to have any goods or chattels, lands, or tenements, to the value of forty pounds, that then every such person so being convicted or attainted of any of the offences aforesaid, shall for his or their said offence suffer imprisonment by the space of one half-year, without bail or main-prize, and to stand upon the pillory the space of one whole hour, in some market town, next adjoining to the place where the offence was committed, in open market there, or in the market town itself where the offence was committed."

S. 4. Such offender not having goods, &c. to the value of 40*l*. to suffer imprisonment, and stand in the pillory.

The fifth section enacts, "That no person or persons, being so convicted or attainted, be from thenceforth received as a witness to be deposed and sworn in any court of record (within

S. 5. Persons convicted not to be received as witnesses until judgment reversed.

(i) *Omealy v. Newell*, 8 East. 304. (k) *Viz.* (as in s. 1.) "the king's Courts of Chancery, the Star Chamber, the Whitehall, or elsewhere within any of the king's dominions of England or Wales, or the marches of the same, where any person or persons have or from thenceforth

"should have authority by virtue of the king's commission, patent, or writ, to hold plea of land, or to examine, hear, or determine any title of lands, or any matter or witnesses concerning the title, right, or interest of any lands, tenements, or hereditaments."

"*England, Wales, or the marches of the same,*) until such time as the judgment given against the said person or persons shall be reversed by attainr or otherwise; and that, upon every such reversal, the parties grieved to recover his or their damages against all and every such person and persons as did procure the said judgment so reversed to be first given against them or any of them, by action or actions to be sued upon his or their case or cases, according to the course of the common laws of this realm."

S. 6. Persons committing perjury to forfeit 20*l.* and to be imprisoned for six months; and their oath not to be received in any court of record until judgment reversed.

The sixth section enacts, "That if any person or persons either by the subornation, unlawful procurement, sinister persuasion or means of any others, or by their own act, consent, or agreement, wilfully and corruptly commit any manner of wilful perjury, by his or their deposition in any of the courts before-mentioned, or being examined *ad perpetuam rei memoriam*, that then every person or persons so offending, and being thereof duly convicted or attainted by the laws of this realm, shall for his or their said offence lose and forfeit twenty pounds, and to have imprisonment by the space of six months without bail or mainprize; and the oath of such person or persons so offending from thenceforth not to be received in any court of record within this realm of *England or Wales, or the Marches* of the same, until such time as the judgment given against the said person or persons shall be reversed by attainr or otherwise: and that upon every such reversal the parties grieved to recover his or their damages against all and every such person and persons as did procure the said judgment so reversed to be given against them or any of them, by action or actions to be sued upon his or their case or cases according to the course of the common laws of this realm."

S. 7. And if such offenders have not goods to the value of 20*l.*, they are to be set in the pillory, and have their ears nailed; and to be disabled from being witnesses until judgment reversed.

The seventh section enacts, "That if it happen the said offender or offenders so offending not to have any goods or chattels to the value of twenty pounds, that then he or they to be set on the pillory in some market-place within the shire, city, or borough, where the said offence shall be committed, by the sheriff or his ministers, if it shall fortune to be without any city or town corporate; and if it happen to be within any such city or town corporate, then by the said head officer or officers of such city or town corporate, or by his or their minister, and there to have both his ears nailed, and from thenceforth to be discredited and disabled for ever to be sworn in any of the courts of record aforesaid, until such time as the judgment shall be reversed, and thereupon to recover his damages in manner and form beforementioned."

Disposal of forfeitures.

By the further provisions of the statute it is enacted, that one moiety of the said forfeitures shall be to the King, and the other moiety to such person as shall be grieved, hindered, or molested by reason of any of the offences before-mentioned, that will sue for the same, &c.; and that as well the Judge and Judges of every such of the said Courts where any such suit shall be, and whereupon any such perjury shall be committed, as also the Justices of assize and gaol delivery, and Justices of peace at their quarter sessions, both within the liberties and without, may inquire of,

Trial of offences.

hear and determine all offences against the said act.^(l) And it is provided, that the said act shall no way extend to any spiritual or ecclesiastical court, but that every such offender, as shall offend in term as aforesaid, shall be punished by such usual and ordinary laws as are used in the said courts.^(m) And it is also provided, that the said statute shall not restrain the authority of any Judge having absolute power to punish perjury before the making thereof; but that every such Judge may proceed in the punishment of all offences punishable before the making of the said statute, in such wise as they might have done and used to do to all purposes, so that they set not on the offender less punishment than is contained in the said act.⁽ⁿ⁾

The act is not to extend to spiritual courts.

Nor to restrain other punishment of perjury.

The important statute relating to the punishment of perjury is the 2 Geo. 2. c. 25. s. 2. which, in order the more effectually to deter persons from committing wilful and corrupt perjury, or subornation of perjury, enacts, "That besides the punishment already to be inflicted by law for so great crimes, it shall and may be lawful for the Court or Judge, before whom any person shall be convicted of wilful and corrupt perjury, or subornation of perjury, according to the laws now in being, to order such person to be sent to some house of correction within the same county, for a time not exceeding seven years, there to be kept to hard labour during all the said time, or otherwise to be transported to some of his Majesty's plantations beyond the seas, for a term not exceeding seven years, as the Court shall think most proper; and thereupon judgment shall be given, that the person convicted shall be committed or transported accordingly over and beside such punishment as shall be adjudged to be inflicted on such person, agreeable to the laws now being; and if transportation be directed, the same shall be executed in such manner as is or shall be provided by law for the transportation of felons; and if any person so committed or transported shall voluntarily escape or break prison, or return from transportation before the expiration of the time for which he shall be ordered to be transported, as aforesaid, such person, being thereof lawfully convicted, shall suffer death as a felon, without benefit of clergy, and shall be tried for such felony in the county where he so escaped, or where he shall be apprehended."

2 Geo. 2. c. 25. s. 2. Perjury and subornation of perjury made further punishable by imprisonment and hard labour, in the house of correction; or by transportation for seven years.

Offenders so committed or transported, escaping or breaking prison, or returning from transportation, to suffer death without benefit of clergy.

Besides these statutes, there are a great number relating to perjury committed in particular proceedings and transactions, and by particular persons, some of which it will be proper to notice in this place. Enactments of this description are to be met with in so many and such various statutes that it is not presumed but that many of them have not come within the author's observation.

Statutes relating to perjury committed in particular proceedings, &c. and by particular persons.

It should first be mentioned that the false affirmation, or declaration, of any of the people called *Quakers*, made instead of an oath, will subject the party to the penalties of perjury, by the enactments of several statutes; 7 & 8 W. 3. c. 34., 8 Geo. 1. c. 6., and 22 Geo. 2. c. 46. The latter statute, (by s. 36.) enacts,

False affirmations of Quakers.

22 Geo. 2. c. 46. s. 36.

(l) S. 8, 9.
(m) S. 11.

(n) S. 13.

"That in all cases wherein by an act or acts of parliament now in force, or hereafter to be made, an oath is or shall be allowed, authorized, directed, or required, the solemn affirmation or declaration of any of the people called Quakers, in the form prescribed by the said act made in the eighth year of his said late Majesty's reign, (o) shall be allowed and taken instead of such oath, although no particular or express provision be made for that purpose in such act or acts; and all persons who are or shall be authorized or required to administer such oath shall be and are hereby authorized and required to administer the said affirmation or declaration; and the said solemn affirmation or declaration so made as aforesaid shall be adjudged and taken, and is hereby enacted and declared to be of the same force and effect, to all intents and purposes, in all courts of justice, and other places, where by law an oath is or shall be allowed, authorized, directed, or required, as if such Quaker had taken an oath in the usual form; and if any person making such affirmation or declaration, shall be lawfully convicted of having wilfully, falsely and corruptly affirmed and declared any matter or thing, which, if the same had been deposed in the usual form, would have amounted to wilful and corrupt perjury, every person so offending shall incur and suffer the like pains, penalties and forfeitures, as by the laws and statutes of this realm are to be inflicted on persons convicted of wilful and corrupt perjury." But, (by s. 37.) it is provided, "that no Quaker shall by virtue of this act be qualified or permitted to give evidence in any criminal cases, or to serve on juries, or to bear any office or place of profit in the government."

Quakers not to give evidence in criminal cases.

Perjury in respect of life annuities.

The statutes for enabling the commissioners of the national debt to grant life annuities usually contain clauses relating to perjury; as the 48 Geo. 3. c. 142. s. 26., and the 52 Geo. 3. c. 129. s. 7. The clause of the latter statute is in the following form: "That if any person in any affidavit or affirmation to be taken under the provisions of this act, shall wilfully or corruptly swear or affirm any matter or thing which shall be false or untrue, every such person so offending, and being thereof duly convicted, shall be and is hereby declared to be subject and liable to such pains and penalties as by any laws now in force any persons convicted of wilful and corrupt perjury are subject and liable to."

Perjury in respect of exchequer bills.

The statute 51 Geo. 3. c. 15., which authorized an issue of *exchequer bills* to commissioners for the purpose of their making advances for the assistance and accommodation of manufacturers, directs certain oaths to be administered; and then (by s. 10.) enacts, "That if any person or persons upon examination upon oath or affirmation before the said commissioners respectively, or if any person or persons making any such affidavit or deposition as before-mentioned, shall wilfully and corruptly give false evidence, or shall in such affidavit or deposition wilfully and corruptly swear, affirm or allege any matter or thing which shall be

(o) That form was as follows:—"I, A. B., do solemnly, sincerely, and truly declare and affirm."

“false or untrue, every such person or persons so offending, and
 “being thereof duly convicted, shall be and is and are hereby de-
 “clared to be subject and liable to such pains and penalties as by
 “any law now in being persons convicted of wilful and corrupt
 “perjury are subject and liable to.”

Many of the statutes relating to the duties of excise contain clauses of a similar kind; as the 42 Geo. 3. c. 94. s. 17. and 56 Geo. 3. c. 103. s. 23. in respect of the drawbacks and allowances upon paper, pasteboard, &c.; and the 55 Geo. 3. c. 113. s. 6. and 56 Geo. 3. c. 106. s. 7. in respect of the duties and drawbacks upon plate-glass, &c. The 46 Geo. 3. c. 112. s. 3. contains a general provision on the subject of the excise; and, after reciting that by the several acts relating to his Majesty's duties of excise, oaths are required to be taken in manner therein mentioned, and that it was expedient to make such provision as thereafter mentioned, for the punishment of persons wilfully taking a false oath, in any of the cases in which an oath is by any such acts directed or required to be taken, it enacts, “That any person or persons
 “who shall be convicted of wilfully taking a false oath in any of
 “the cases in which an oath is by any act or acts of parliament
 “relating to the duties of excise directed or required to be taken,
 “shall be liable to the pains and penalties to which persons are
 “liable for wilful and corrupt perjury.”

Perjury relating to the duties of excise.

The statute 6 Geo. 4. c. 106. entitled “An act for the management of the customs,” enacts (by s. 31.) that, “upon examinations and inquiries made by any surveyor-general of the customs, or any inspector-general of the customs, for ascertaining
 “the truth of facts relative to the customs, or the conduct of officers or persons employed therein, and upon the like examinations and inquiries made by the collector and controller of any
 “out-port in the United Kingdom, or of any port in the Isle of Man, or made by any person or persons in any of the British
 “possessions abroad, appointed by the commissioners of his Majesty's customs to make such examinations and inquiries, any
 “person examined before him or them as a witness shall deliver
 “his testimony on oath, to be administered by such of the surveyors-general, or such of the inspectors-general, or such collector and controller, or such person or persons as shall examine
 “him, and who are hereby authorized to administer such oath,
 “and if such person shall be convicted of making a false oath,
 “touching any of the facts so testified on oath, or of giving false
 “evidence on his examination on oath, before any of the surveyors-general or inspectors-general of the customs, or such
 “collector and controller, or such person or persons, in conformity to the directions of this act, every such person so convicted as aforesaid shall be deemed guilty of perjury, and shall
 “be liable to the pains and penalties to which persons are liable
 “for wilful and corrupt perjury.”

Perjury relating to the duties of the customs.

The statute 43 Geo. 3. c. 56. entitled, “An act for regulating
 “the vessels carrying passengers from the United Kingdom to
 “his Majesty's plantations and settlements abroad, or to foreign
 “parts, with respect to the number of such passengers,” enacts,
 “(by s. 20.) “That if any person taking any oath by this act

Perjury in respect to passengers to foreign settlements.

“ authorized or required to be taken, shall thereby commit wilful
 “ perjury, or if any person shall unlawfully procure or suborn any
 “ person to take any oath by this act authorized or required to be
 “ taken, whereby such person shall commit wilful perjury, every
 “ such person shall incur and suffer the like pains and penalties
 “ as are by law inflicted upon persons committing wilful and cor-
 “ rupt perjury, or subornation of perjury, in Great Britain and
 “ Ireland respectively.”

Perjury relat-
 ing to the
 stamp duties.

The last stamp act, 55 Geo. 3. c. 184. s. 53. contains a general provision in respect of oaths relating to the stamp duties; and enacts, “ That all and every person and persons before whom any
 “ affidavit or solemn affirmation is or shall be required or directed
 “ to be made by this or any former or future act of parliament
 “ relating to any stamp duties, shall be, and they are hereby au-
 “ thorized to take the same and administer the proper oath or
 “ affirmation for that purpose; and if any person making any
 “ such affidavit or affirmation shall knowingly and wilfully make
 “ a false oath or affirmation of or concerning any of the matters
 “ to be therein specified and set forth, every person so offending
 “ and being thereof lawfully convicted, shall be subject and liable
 “ to such pains and penalties as by any law now in force, persons
 “ convicted of wilful and corrupt perjury, are subject and liable
 “ to.” The statute 54 Geo. 3. c. 133. “ An act for enabling the
 “ commissioners of stamps to make allowances for spoiled stamps
 “ on policies of assurance, and for preventing frauds relating
 “ thereto,” enacts, (by s. 13.) “ That if any person making any
 “ such affidavit or affirmation as aforesaid, shall knowingly and
 “ wilfully make a false oath or affirmation, of or concerning any of
 “ the matters to be therein specified or set forth, every person so
 “ offending, and being thereof lawfully convicted, shall be subject
 “ and liable to such pains and penalties as by any law now in force
 “ persons convicted of wilful and corrupt perjury are subject and
 “ liable to.”

Perjury relat-
 ing to naval
 stores, &c.

The statute 39 & 40 Geo. 3. c. 89. entitled, “ An act for the
 “ better preventing the embezzlement of his Majesty’s naval, ord-
 “ nance, and victualling stores,” enacts, (by s. 36.) “ That if any
 “ person upon examination on oath or affirmation before any com-
 “ missioners of the navy, ordnance, or victualling respectively, or
 “ before any justice of the peace in *Great Britain*, in any matter
 “ relating to the execution of this act, shall wilfully and corruptly
 “ give false evidence, or shall, in any information or deposition
 “ sworn, or affirmation taken in writing before any such commis-
 “ sioner or justice, wilfully and corruptly swear or affirm any
 “ matter or thing which shall be false or untrue, every such per-
 “ son so offending, and being thereof lawfully convicted, shall be
 “ and is hereby declared to be subject and liable to the like pains
 “ and penalties as any persons convicted of wilful and corrupt
 “ perjury are by any law now in force subject and liable to.”

Perjury in affi-
 davits, &c. for
 the Irish courts.

The statute 55 Geo. 3. c. 157., by which the courts of law and equity in Ireland were empowered to grant commissions for tak-
 ing affidavits in all parts of Great Britain, enacts, (by s. 8.)
 “ That every person who shall in *England* or *Scotland*, be sworn
 “ or deponed, and examined as a witness, or sworn or deponed

“to the truth of any answer or plea or affidavits before any officer
 “or officers who shall be appointed under the authority of this
 “act for taking the same, and who shall, in his or her answer,
 “plea, or affidavit, wilfully swear or depone falsely, shall be
 “deemed guilty of perjury, and shall incur and be liable to the
 “same pains and penalties as if such person had wilfully sworn or
 “deponed falsely in the open court, wherein the suit in which
 “such oath was so taken then depended.”

The statute 55 Geo. 3. c. 60. relating to the execution of letters of attorney, and wills of petty officers, seamen, and marines in the navy, enacts, (by s. 19.) “That if any person or persons shall
 “wilfully and knowingly falsely make oath or affirmation to any
 “of the matters hereinbefore directed to be verified on oath or
 “affirmation, or suborn any other person or persons so to do,
 “every such person or persons so offending shall be subject and
 “liable to the same pains, penalties, and forfeitures as persons
 “guilty of wilful and corrupt perjury, or subornation of perjury,
 “are by any law or laws now in force subject and liable to.” The
 57 Geo. 3. c. 127. s. 4., in order to bring into one act the several provisions made for the prevention and punishment of the crimes of personation and forgery, for the purpose of obtaining prize-money, enacts, “That if any person or persons shall willingly and
 “knowingly take a false oath to obtain the probate of any will or
 “wills, or to obtain letters of administration, in order to receive
 “or to enable any other person to receive any wages, pay, prize-
 “money, bounty-money, pension-money, or other allowances of
 “money due or supposed to be due for or in respect of the ser-
 “vices of any such officer, seaman, marine, or other person as
 “aforesaid, performed or supposed to have been performed on
 “board of any ship or vessel of his Majesty, his heirs, &c.” such offenders shall be deemed guilty of felony without clergy.

Perjury relating to the wills and letters of attorney of seamen and marines.

By the statute 1 & 2 Geo. 4. c. 61. s. 6. which regulates the appropriation of unclaimed shares of prize money belonging to soldiers and seamen in the service of the East India Company, it is enacted, that if any person shall be convicted of making a false oath touching any of the matters directed or required by that act to be testified on oath, such person so convicted shall be deemed guilty of perjury, and liable to be punished as persons guilty of perjury in England. And it also provides for the punishment of persons procuring or suborning any other person to swear falsely in any such oath.

Perjury in matters relating to certain East India prize money.

The mutiny acts usually contain the following clause: (as in 6 Geo. 4. c. 5. s. 150.) namely, “That any person taking a false
 “oath in any case wherein an oath is required to be taken by this
 “act, shall be deemed guilty of wilful and corrupt perjury, and
 “being thereof duly convicted, shall be liable to such pains and
 “penalties as by any laws now in force any persons convicted of
 “wilful and corrupt perjury are subject and liable to.” (p) And with respect to naval courts-martial, the 22 Geo. 2. c. 33. s. 17. enacts, “That all and every person and persons who shall commit
 “any wilful perjury, in any evidence or examination upon oath at

Perjury by the mutiny acts:

And in naval courts-martial.

(p) And see a similar clause in the 6 Geo. 4. c. 6. being the act for regulating the marine forces, s. 60.

“ any such court-martial, or who shall corruptly procure or suborn
 “ any person to commit such wilful perjury, shall and may be
 “ prosecuted in his Majesty’s Court of King’s Bench, by indictment or information ; and every issue joined in any such indictment or information shall be tried by good and lawful men of
 “ the county of *Middlesex*, or such other county as the said Court
 “ of King’s Bench shall direct ; and all and every person and persons, being lawfully convicted upon any such indictment or information, shall be punished with such pains and penalties, as
 “ are inflicted for the like offences respectively by the 5 Eliz. c. 9.
 “ and 2 Geo. 2. c. 25.”

Perjury relating to quarantine.

The 6 Geo. 4. c. 78. s. 29. enacts, “ that in all cases wherein
 “ by virtue of this act, or any other act, hereafter to be made
 “ touching *quarantine*, any examination or answer shall be taken
 “ or made upon oath, the person who shall be authorised and required to take such examinations and answers shall and may
 “ be deemed to have full power and authority to administer such oaths ; and if any person who shall be interrogated or examined
 “ shall wilfully swear falsely to any matter concerning which
 “ such person shall depose or make oath on such examination, or in such answer, or if any person shall procure any
 “ other person so to do, he or she so swearing falsely, or procuring any other person so to do, shall be deemed to have been
 “ guilty of, and shall be liable to be prosecuted for perjury, or
 “ subornation of perjury, as the case may be, and shall suffer the
 “ pains, penalties, and punishments of the law, in such case respectively made and provided.”

Perjury in respect of pilotage, &c. of ships.

The statute 48 Geo. 3. c. 104. entitled, “ An act for the better
 “ regulation of pilots, and of the pilotage of ships and vessels
 “ navigating the British seas,” enacts (by s. 70.) “ that every person, who, in any examination upon oath under the provisions of
 “ this act, shall wilfully give false testimony or a false account of
 “ the matter sworn to by him, shall be liable to be prosecuted for
 “ the same by indictment ; and, if duly convicted of false swearing
 “ in the premises, shall be subject and liable to such punishments,
 “ disqualifications, and disabilities, as any person would be subject or liable to for wilful and corrupt perjury, in any other case,
 “ by the laws and statutes of this realm.”

In respect of the registering vessels.

The late act for the registering of vessels 4 Geo. 4. c. 41. s. 47. enacts, that if any person shall falsely make oath to any of the matters thereinbefore required to be verified, such person shall suffer the like pains, &c. as are incurred by persons committing wilful and corrupt perjury.

Perjury under the slave trade act.

The statute 5 Geo. 4. c. 113. which was passed to prevent the traffic in slaves, enacts (by s. 41.) that if any oath taken under this act shall be wilfully false, or if such false oath shall be unlawfully or wilfully procured or suborned, the offender shall incur and suffer the like pains and penalties as are by law inflicted upon persons committing wilful and corrupt perjury or subornation of perjury respectively. And section 58 provides for the prosecution, trial, and punishment of persons who may give false evidence in any examination or deposition, or affidavit had or taken upon or in any proceeding before the commissary, judges, or commissioners,

mentioned in the act, or before the secretary or registrar under the treaties, conventions, instructions or regulations therein mentioned.

By the 50 Geo. 3. c. 65. an act for uniting the offices of surveyor-general of the land revenues of the crown, and surveyor-general of his majesty's woods, &c. it is enacted, (s. 11.) that any officer or other person, who shall in any verification, or examination upon oath mentioned in that act, be guilty of wilful and corrupt perjury, shall be liable to be punished in such manner as by the different laws and statutes then in force for the punishment of wilful and corrupt perjury.

Perjury in respect of the land revenues, &c. of the crown.

The general Inclosure act, 41 Geo. 3. c. 109. s. 43. enacts, "that if any person or persons shall, in any examination, affidavit, deposition, or affirmation, to be had or taken in pursuance of this act, before such justice or justices, or such commissioner or commissioners, knowingly and wilfully swear and affirm any matter or thing which shall be false or untrue, every such person so offending shall, on conviction thereof, be deemed guilty of perjury, and shall suffer the like pains and penalties as persons guilty of wilful and corrupt perjury are now subject and liable to."

Perjury by the general inclosure act.

The registry act for the West Riding of Yorkshire, 2 & 3 Ann. c. 4. enacts (by s. 19.) "that if any person or persons shall at any time forswear himself before the said register or his deputy, or before any Judge or master in Chancery, in any of the cases aforesaid, and be thereof lawfully convicted, such person or persons shall incur and be liable to the same penalties, as if the same oath had been made in any of the courts of record at Westminster." A similar provision is contained also in the 5 & 6 Ann. c. 18. which regulates the inrolment of bargains and sales of lands, &c. in the same Riding; in the *Middlesex* registry act, 7 Ann. c. 20. s. 15.; and also in the 8 Geo. 2. c. 6. s. 33. which relates to the registry of deeds, &c. in the North Riding, of the county of York.

Perjury under the registry acts for Yorkshire and Middlesex.

The *Bribery act* 2 Geo. 2. c. 24. gives the form of an oath or affirmation (in the case of a Quaker,) to be taken by electors, and the form of an oath to be taken by the returning officer; and then enacts (by s. 5.) "that if any returning officer, elector or person taking the oath or affirmation hereinbefore mentioned, shall be guilty of wilful and corrupt perjury, or of false affirming, and be thereof convicted by due course of law, he shall incur and suffer the pains and penalties, which by law are enacted or inflicted in cases of wilful and corrupt perjury." And the 18 Geo. 2. c. 18. s. 1. after giving the form of an oath or affirmation to be taken by freeholders at county elections, enacts, that "in case any freeholder or other person taking the said oath or affirmation hereby appointed, shall thereby commit wilful perjury, and be thereof convicted, and if any person do unlawfully and corruptly procure or suborn any freeholder, or other person, to take the said oath or affirmation, in order to be polled, whereby he shall commit such wilful perjury, and shall be thereof convicted, he and they for every such offence," shall incur such pains and penalties as are in and by two acts of parliament," (the one the 5 Eliz. c. 9., the

Perjury by electors, &c. 2 Geo. 2. c. 24.

18 Geo. 2. c. 18.

other the 2 Geo. 2. c. 25.) "contrary to the said acts." The word *inflicted*, or some word of like signification, appears to have been omitted in the conclusion of this section.

Perjury before committees of the House of Commons, on the trial of controverted elections.

The statute 10 Geo. 3. c. 16. (g) entitled "an act to regulate the trials of controverted elections or returns of members to serve in Parliament," provides for the appointment of select committees, and directs certain oaths to be taken; and then by s. 29. enacts "that the oaths by this act directed to be taken in the house, shall be administered by the said clerk or clerk assistant, in the same manner as the oaths of allegiance and supremacy are administered in the House of Commons; and that the oaths by this act directed to be taken before the said select committee, shall be administered by the clerk attending the said select committee; and that all persons who shall be guilty of wilful and corrupt perjury in any evidence which they shall give before the house, or the said select committee, in consequence of the oath which they shall have taken by the direction of this act, shall, on conviction thereof, incur and suffer the like pains and penalties, to which any other person convicted of wilful and corrupt perjury, is liable by the laws and statutes of this realm."

Perjury by bankrupts and other persons examined before commissioners of bankrupt.

The statute 6 Geo. 4. c. 16. entitled "An act for amending the laws relating to bankruptcy," enacts (by s. 99.) "that any bankrupt or other person who shall, in any examination before the commissioners, or in any affidavit or deposition authorised or directed by the present, or any act hereby repealed, wilfully and corruptly swear falsely, being convicted thereof, shall suffer the pains and penalties in force against wilful and corrupt perjury; and where any oath is hereby directed or required to be taken or administered, or affidavit to be made by or to any party, such party, if a Quaker, shall or may make solemn affirmation, and such Quaker shall incur such danger or penalty for refusing to make such solemn affirmation in such matters, when thereto required, as is hereby provided against persons refusing to be sworn; and all Quakers who shall, in any such affirmation knowingly and wilfully affirm falsely, shall suffer the same penalties as are provided against persons guilty of wilful and corrupt perjury; and all persons before whom oaths or affidavits are hereby directed to be made, are respectively empowered to administer the same, and also such solemn affirmation as aforesaid."

Perjury by insolvent debtors.

The statute 7 Geo. 4. c. 57. entitled "An act to amend and consolidate the laws for the relief of insolvent debtors in England," enacts (by s. 71.) "that if any prisoner who shall apply for his or her discharge under the provisions of this act, or any other person taking an oath under the provisions of this act, shall wilfully forswear and perjure himself or herself, in any oath to be taken under this act, and shall be lawfully convicted thereof, he or she so offending, shall suffer such punishment as may by law be inflicted on persons convicted of wilful and corrupt perjury; and that in all cases wherein by this act an oath is required, the solemn affirmation of any person, being a Quaker, shall and may be accepted and taken in lieu thereof; and that every person

(g) This act was made perpetual by 14 Geo. 3. c. 15.

“making such affirmation, who shall be convicted of wilful false affirmation, shall incur and suffer such and the same penalties as are inflicted and imposed upon persons convicted of wilful and corrupt perjury.”

There are also some statutes of limited and local operation which contain enactments respecting perjury, a few of which may be briefly noticed. The 11 Geo. 1. c. 18. s. 3. relates to false oaths taken at elections for the city of *London*; the 44 Geo. 3. c. 60. s. 4. to perjury at elections for *Aylesbury*; the 47 Geo. 3. sess. 2. c. 109. s. 123. (local act) to perjury under the *Dublin* improvement act; the 47 Geo. 3. sess. 2. c. 68. s. 149., 56 Geo. 3. c. 21. s. 49., and 56 Geo. 3. c. 78. s. 50. (local acts) relate to false oaths taken in the course of the vending, admeasurement, &c. of *coals* in *London*, and certain places in the neighbouring counties; and the 55 Geo. 3. c. 99. s. 16. (local act) to false oaths taken in respect of *bread* sold in *London*, or within the bills of mortality. These statutes, and others of a similar kind, either provide that the offenders shall be punishable under the 5 Eliz. c. 9., and the 2 Geo. 2. c. 25. s. 2., or (which is more generally the case) enact, “that they shall be subject and liable to the pains and penalties, which persons convicted of wilful and corrupt perjury are subject and liable to.”

Perjury by statutes of limited and local operation.

With respect to the first of the statutes above set forth, namely, the 5 Eliz. c. 9. as it is but little resorted to at the present time, on account of prosecutions upon it being more difficult than at the common law; and as it did not alter the nature of the offence, but merely enlarged the punishment,^(s) a brief statement of some of the principal points decided upon its construction will probably be deemed sufficient.

Construction of the statute 5 Eliz. c. 9.

In many instances an indictment will lie at common law, when it will not lie upon this statute. Thus where a witness for the King swears falsely, he cannot be indicted on the statute.^(t)

It has been adjudged, that a man cannot be guilty of perjury within this statute, in any case wherein he may not possibly be guilty of subornation of perjury within it; on the ground that it is reasonable to give the whole statute the same construction; and that it cannot well be intended, that the makers of it meant to extend its purview farther as to perjury, which they appear to have considered as the less crime, than to subornation of perjury, which they seem to have esteemed the greater: and, therefore, since the clause concerning subornation of perjury, mentioning only matters depending by writ, bill, plaint, or information, concerning hereditaments, goods, debts, or damages, &c. does not extend to perjury on an indictment or criminal information; the clause concerning perjury, though penned in more general words, has been adjudged to come under the like restriction.^(u) And it has also been resolved, that as the clause concerning subornation of perjury relates only to perjury by *witnesses*, that concerning perjury extends to no other perjury than that of a *witness*; and, therefore, not to perjury in an answer in chancery; or in swearing the peace against a man; or in a presentment by a homager in a

^(s) *Baston v. Gouch*, 3 Salk. 269.

^(t) *Id. ibid.*

^(u) 5 Bac. Abr. *Perjury*, (B). 1 Hawk. P. C. c. 69. s. 19.

court baron; or in a wager of law; or in swearing before commissioners of inquiry of the King's title to lands.(x) And by the opinions of some, a false affidavit against a man, in a court of justice, is not within the statute.(y) But it is observed, that if such affidavit be by a third person, and relate to a cause depending in suit, before the Court, and either of the parties in variance be grieved, hindered, or molested, in respect of such cause, by reason of the perjury, it may be strongly argued, that it is within the purview of the statute.(z) It seems to be the better opinion, that a false oath before the sheriff on a writ of inquiry of damages, is within the statute.(a)

It has been collected from the clause giving an action to the party grieved, that no false oath is within the statute, which does not give some person a just cause of complaint; and, therefore, that if the thing sworn be true, though it be not known by him that swears it to be so, the oath is not within the statute, because it gives no good ground of complaint to the other party, who would take advantage of another's want of sufficient evidence to make out the justice of the cause.(b) And upon the same ground no false oath can be within the statute, unless the party against whom it was sworn suffered some disadvantage by it: therefore, in every prosecution on the statute, it is necessary to set forth the record wherein the perjury is supposed to have been committed, and to prove at the trial that there is such a record, either by actually producing it, or by an attested copy; and it is necessary not only to set forth in the pleadings the point wherein the false oath was taken, but to shew also how it conduced to the proof or disproof of the matter in question.(c) And if an action on the statute be brought by more than one, it is necessary to shew how the perjury was prejudicial to each of the plaintiffs.(d) But it seems that a perjury, which tends only to aggravate or extenuate the damages, is as much within the statute as a perjury that goes directly to the point in issue; and that perjury committed in a cause wherein an erroneous judgment is given, is a good ground of a prosecution upon the statute till the judgment be reversed.(e)

Indictment on
the 5 Eliz. c. 9.

It has been holden that every indictment or action upon this statute must exactly pursue the words of it; and, therefore, if it allege that the defendant deposed such a matter *falsò et deceptivè*, or *falso et corruptè*, or *falso et voluntariè*, without saying *voluntariè et corruptè*, it is not good, though it conclude that *sic voluntarium et corruptum commisit perjurium contra formam statuti*, &c. Also it is said to be necessary expressly to shew that the defendant was sworn; and that it is not sufficient to say that

(x) 1 Hawk. P. C. c. 69. s. 20. 5 Bac. Abr. *Perjury*, (B).

(y) 2 Roll. Abr. 77. 1 Roll. 79. 3 Keb. 345.

(z) 1 Hawk. P. C. c. 69. s. 21.

(a) 5 Bac. Abr. *Perjury*, (B). 1 Hawk. P. C. c. 69. s. 21.

(b) 1 Hawk. P. C. c. 69. s. 22. 5 Bac. Abr. *Perjury*, (B). We have seen that this is otherwise at common law. *Ante*, 518.

(c) 5 Bac. Abr. *Perjury*, (B). 1 Hawk. P. C. c. 69. s. 23.

(d) *Id. ibid.*

(e) 1 Hawk. P. C. c. 69. s. 23. 5 Bac. Abr. *Perjury*, (B). In 1 Hawk. P. C. c. 69. s. 4. there is a *quære* whether perjury in a court, whose proceedings are afterwards reversed by error, may not still be punished as perjury, notwithstanding such reversal?

tacto per se sacro evangelio deposuit. But there is no need to shew whether the party took the false oath through the subornation of another, or of his own act, though the words of the statute are, "*If persons by subornation, &c. or their own act, &c. shall commit wilful periury;*" for there being no medium between the branches of this distinction, they seem to be put in *ex abundanti*, and to express no more than the law would have implied, and, therefore, operate nothing.(f)

It seems that if perjury be committed that is within this statute, but the indictment concludes not *contra formam statuti*, yet it is a good indictment at common law, but not to bring the offender within the corporal punishment of the statute.(g)

For the purpose of facilitating prosecutions for perjury, and of preventing great offenders from escaping punishment by reason of the expense attending prosecutions, the statute 23 Geo. 2. c. 11. s. 3. enacts, "that it shall and may be lawful to and for any of his Majesty's justices of assize, or *nisi prius*, or general gaol delivery, or of any of the great sessions of the principality of Wales, or of the counties palatine; and they are hereby authorized (sitting the court, or within twenty-four hours after,) to direct any person examined as a witness upon any trial before him or them, to be prosecuted for the said offence of perjury, in case there shall appear to him or them a reasonable cause for such prosecution, and that it shall appear to him or them proper so to do; and to assign the party injured, or other person undertaking such prosecution, counsel, who shall and are hereby required to do their duty without any fee, gratuity, or reward for the same: and every such prosecution, so directed as aforesaid, shall be carried on without payment of any tax or duty, and without payment of any fees in court, or to any officer of the court who might otherwise claim or demand the same. And the clerk of assize, or his associate or prothonotary, or other proper officer of the court (who shall be attending when such prosecution is directed) shall, and is hereby required, without any fee or reward, to give the party injured, or other person undertaking such prosecution, a certificate of the same being directed, together with the names of the counsel assigned him by the Court; which certificate shall in all cases be deemed sufficient proof of such prosecution having been directed as aforesaid, provided that no such direction or certificate shall be given in evidence upon any trial to be had against any person upon a prosecution so directed as aforesaid."

Facilities given to prosecutions for perjury.

23 Geo. 2. c. 11. s. 3. The Judges of assize, &c. may direct any witness to be prosecuted for perjury, and assign counsel, &c.

The same statute also makes provision for the more easy framing of indictments for perjury and subornation of perjury. The first section, reciting that by reason of the difficulties attending prosecutions for perjury and subornation of perjury, those heinous crimes had frequently gone unpunished, enacts, "that in every information or indictment to be prosecuted against any person for wilful and corrupt perjury, it shall be sufficient to set forth the substance of the offence charged upon the defendant, and by what Court, or before whom the oath was taken (averring such

Provision for the more easy framing of indictments.

(f) 1 Hawk. P. C. c. 69. s. 17, 18. authorities there cited.
5 Bac. Abr. Perjury, (B). and the au- (g) 2 Hale, 191, 192.

“ Court, or person or persons to have a competent authority to administer the same) together with the proper averment or averments to falsify the matter or matters, wherein the perjury or perjuries is or are assigned, without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding, either in law or in equity, other than as aforesaid ; and without setting forth the commission or authority of the Court, or person or persons before whom the perjury was committed.” And the second section enacts, “ that in every information or indictment for subornation of perjury, or for corrupt bargaining or contracting with others to commit wilful and corrupt perjury, it shall be sufficient to set forth the substance of the offence charged upon the defendant, without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding, either in law or equity, and without setting forth the commission or authority of the Court, or person or persons before whom the perjury was committed, or was agreed or promised to be committed.”

The provisions of this statute should be attended to in drawing indictments.

It was lamented by a very great Judge, that the party prosecuting for perjury, did not more frequently avail himself of this excellent law, made for the purpose of obviating difficulties in drawing the indictments.^(h) In the case in which this remark was made, the commission at the Admiralty session had been unnecessarily set forth in the indictment; and it was admitted that where a prosecutor undertakes to set out in the indictment more of the proceedings than he need under this statute, he must set them forth correctly; but it was holden that the commission at the Admiralty session being set forth as directed to A., B., and C., and others not named, of which number A., B., and C., amongst others, *should always be one*, the Court must take it to mean that if either of the persons, named of the quorum, were present, it would be sufficient.⁽ⁱ⁾

Several persons not to be joined in an indictment for perjury.
Venue.

It has been holden, on motion in arrest of judgment, that several persons cannot be joined in one indictment for perjury, the crime being in its nature several.^(k) But this does not apply to subornation of perjury.^(l)

With respect to the *venue* in an indictment for perjury it may be briefly observed that the parish or place, unless used as giving some specific local description, will not be material; and that it will be sufficient to shew the offence committed any where within the county. But it seems to be necessary that a place should be stated in the indictment to which a venue may be properly awarded: and an indictment was holden to be bad for laying the offence to have been committed “ at the Guildhall of the city of

(h) By Lord Kenyon, C. J., in *Rex v. Dowlin*, 5 T. R. 317. And a case is mentioned in which the Court of K. B. referred an indictment for perjury, which had been removed from Hick's Hall, to the master, to see what part of the record was unnecessary; and made an order that the clerk of the peace should pay the expence incurred by such unnecessary

part. The indictment was drawn to an exorbitant length, by stating all the continuances on the former prosecution, &c. 1 Leach 201.

(i) *Rex v. Dowlin*, 5 T. R. 311.

(k) *Rex v. Philips and another*, 2 Str. 921.

(l) *Reg. v. Rhodes and another*, 2 Ld. Raym. 886.

London," without stating any parish or ward.(m) In a case where perjury had been committed in the booth-hall within the limits of the city of *Gloucester*, which is a county of itself, on the trial of a cause before a jury of the county at large, it was holden that the indictment might be found and tried by juries of the county at large.(n) A sufficient venue was holden to be laid on the act of taking the false oath in a case where perjury was assigned on an affidavit of an attorney of the Court made in answer to a summary application against him, and where it was objected that it was not stated where the Court was holden when the original application was made, or when the rule was made, calling upon the defendant to answer the charge.(o) In the instance of making an affidavit in the country, the party is not to be indicted where the affidavit may happen to be used, but in the county where the offence was complete, by making the false oath.(p)

The indictment must also contain an allegation of *time*; which is sometimes material and necessary to be laid with precision, and sometimes not.(q) Where it is not material, it need not be positively averred; and, if under a *videlicet*, may be rejected.(r) In a case where an indictment for perjury, charged to have been committed in the defendant's answer to a bill of discovery filed in the Court of Exchequer, alleged that the bill was filed on a day specified, it was holden that the day was not material, as it was not alleged as part of the record; and, therefore, that it was no variance, though the bill, when produced, appeared to be entitled generally of a preceding term.(s) But in the same case where an assignment of perjury alleged that the defendant, at the time of effecting a policy of insurance purporting to have been underwritten by A., B., C., and others, on a day specified, well knew, &c. and it appeared on producing the policy that A. underwrote it on a different day, the defect was holden to be fatal, although it appeared that B., C., &c. did underwrite the policy on that day.(t) Where the perjury was assigned in answer to a bill alleged to have been filed in a particular term, and a copy produced was of a bill amended in a subsequent term, by order of the Court, it was held to be no variance, the amended bill being part of the original bill.(u)

Allegation of time in the indictment.

It is proper to make such a statement by way of inducement as will be sufficient to explain the assignment of perjury, and make it intelligible and consistent. And the statements in the indictment must, in general, be made with great accuracy. An indictment for perjury stating a bill of Middlesex as "issuing out

Necessary statements in the indictment.
Variances.

(m) *Harris's case*, 2 Leach 800.

(n) *Rex v. Gough*, Dougl. 760. In this case a charter had made Gloucester a county of itself, reserving only the trial of matters arising in the county at large within Gloucester as before. The Judges intimated their opinions that the indictment might be in either county, but they were clear that it might be in the county at large.

(o) *Rex v. Crossley*, 7 T. R. 315.

ante, 519.

(p) By Lord Kenyon, C. J. *Id. ibid.*

(q) *Rex v. Aylett*, 1 T. R. 69.

(r) *Rex v. Aylett*, 1 T. R. 70, 71.

(s) *Rex v. Hucks, cor. Lord Ellenborough*, C. J., 1 Stark. R. 521. And see *Rastal v. Stratton*, 1 H. B. 49. *Woodford v. Ashley*, 2 Campb. 193. and 1 Stark. Crim. Plead. 243.

(t) *Rex v. Hucks*, 1 Stark. R. 521.

(u) *Rex v. Waller*, Mich. 8 Geo. 1. 3 Stark. Evid. 1139.

"of the office of the chief clerk assigned to enrol pleas in the "court, &c." has been holden to be bad.(x) And a misrecital of the judgment-roll of the cause, at the trial of which the perjury is alleged to have been committed, is also fatal.(y) And if the oath is stated to have been at the assizes holden before Justices assigned to take the said assize before A. B., one of the said Justices, the said Justice then and there having power, &c. it will be a fatal variance if the oath was administered when the Judge was sitting, under the commission of oyer and terminer and gaol delivery.(z) And where an indictment for perjury, committed in a written deposition before a magistrate, in which deposition a word necessary to the sense had been omitted, set out the *substance and effect* of the deposition, and supplied a word which the sense required, as though it were actually in the deposition, the variance was holden to be fatal.(a) And where a count in an indictment undertakes to set out continuously the substance and effect of what the defendant swore upon his examination, it must be proved that in *substance and effect* he swore the whole of what is set out, though several distinct assignments of perjury are made thereon.(b)

In an indictment for perjury committed before a select committee of the House of Commons, it was averred that the election was held by virtue of a certain precept of the high sheriff, by him duly issued to the bailiff of the borough of New Malton; and it was holden that this was not matter of description, and that the production of a precept, which in fact issued to the bailiff of the borough of New Malton, though directed to the bailiff of the borough of Malton, was sufficient: but the indictment also stated that A. and B. were *returned* to serve as burgesses for the said borough of New Malton; and this was considered as a description of the indenture of return, in which the borough was described as the borough of Malton, and the variance was holden to be fatal. (c) But an indictment may be supported upon an answer in a court of equity though the answer is not correctly entitled and the name

(x) *Rex v. Scoole, cor. Kenyon, C. J., Peake N. P. R. 112.*

(y) *Rex v. Eden, cor. Kenyon, C. J., 1 Esp. R. 97.* The indictment alleged that the cause came on to be tried before Lloyd, Lord Kenyon, &c. William Jones being associated, &c.; and from the judgment-roll it appeared that Roger Kenyon was associated, &c.; and the variance was held to be fatal.

(z) *Rex v. Lincoln, Mich. T. 1820, MS. Bayley, J., and Russ. & Ry. 421.*

(a) *Rex v. Taylor, cor. Ellenborough, C. J., 1 Campb. 104.* The deposition should have been set out literally, and the meaning explained by an *innuendo*. The indictment stated that the defendant went before a Justice of the peace, and swore in substance to the effect following, that is to say, &c., and part of the deposi-

tion, so set forth, was that a person, therein named, assaulted the deponent with an umbrella, and, *at the same time*, threatened to shoot her with a pistol; but when the deposition was produced, it appeared that after stating the assault with the umbrella, it proceeded thus, "and at the *same* threatened to shoot," &c. omitting the word *time*.

(b) *Rex v. Leefe, cor. Ellenborough, C. J., 2 Campb. 134. post. note (u).* It appears, however, that in *Reg. v. Rhodes* and another, 2 Lord Raym. 886, it was holden, upon an indictment containing only one count, that although all the assignments of perjury but one were bad, judgment should not be arrested. And see *Compagnon and wife v. Martin, 2 Black. R. 790.*

(c) *Rex v. Leefe, 2 Campb. 141.*

of one of the parties be mistaken. Thus where an indictment alleged that Francis Cavendish Aberdeen and others exhibited their bill in the Exchequer, &c., and, on the production of the bill, the complainants on the face of it purported to be *J. C. Aberdeen*, and others, it was holden that this was not a variance, and that it was competent to the prosecutor to prove, by other means than by the bill itself, the allegation that *Francis Cavendish Aberdeen* did, in fact, exhibit his bill. (*d*) And it was further holden not to be a variance, although after the allegation in question, and after setting out such parts of the bill as were necessary, these words were added, "as appears by the said bill, &c. filed of record;" on the ground that these words referred to the last antecedent, and could not be considered as incorporated with the prefatory allegation that Francis Cavendish Aberdeen exhibited his bill. (*e*) And in an indictment for perjury committed in an answer to a bill in chancery, where the bill was stated to have been filed by A. against B. (the defendant in the indictment,) and another, though in fact it was filed against B., C., and D., the variance was holden not to be fatal; the perjury being assigned on a part of the answer which was material between A. and B. (*f*) And it has been holden, that though there be two counts in the original proceeding, an averment that an *issue* came on to be tried is not a variance. (*g*) And a variance between the affidavit actually sworn, and in which the perjury was charged to have been committed, and the affidavit stated in the indictment, by leaving out the letter *s* in the word *understood*, was holden to be immaterial. (*h*) In a subsequent case, the defendant was tried on an indictment for perjury, committed in giving evidence as the prosecutor of an indictment against A. for an assault; and it appeared that the indictment for the assault charged, that the prosecutor had received an injury, "*whereby his life was greatly despaired of*;" but that in the indictment for *perjury*, the indictment for *the assault*, being introduced in these words "which indictment was presented *in manner and form following, that is to say*," and then set forth at length, did not recite the above-mentioned passage correctly, but omitted the word "*despaired*;" upon which the counsel for the defendant admitted that it was not necessary to have recited the indictment for the assault; but he contended that the prosecutor, by the words "*in manner and form following, that is to say*," had undertaken to recite it; and that, having so done, he was bound to set it forth *verbatim*. But the learned Judge over-ruled the objection; and said, that the word "*tenor*" had so strict and technical a meaning as to make a literal recital necessary; but that by the words "*in manner and form following, that is to say*" nothing more was made requisite than a substan-

(*d*) *Rex v. Roper, cor. Ellenborough, C. J.* 1 Stark. R. 518.

(*e*) *Id. Ibid.*

(*f*) *Rex v. Benson, cor. Ellenborough, C. J.* 2 Campb. 509.

(*g*) *Peake's N. P. C.* 37.

(*h*) *Beech's case*, 1 Leach 183. The

inspection of a record is within the peculiar province of the court; and therefore, if a doubt arise as to any word upon a record, the court and not the jury must resolve that doubt. By Lord Ellenborough, C. J., in *Rex v. Hucks*, 1 Stark. R. 521.

Averment that the complaint was heard, &c.

The indictment must state that the defendant was duly sworn, &c.

tial recital : and that the variance, therefore, in the present case, was only matter of form, and did not vitiate the indictment. (i)

In a case where a complaint having been made *ore tenus* by a solicitor, before the Chancellor in the Court of Chancery, of an arrest in returning home after the hearing of a cause, the indictment stated that, "at and upon the hearing of the said complaint" the defendant deposed, &c. ; and this was holden to be a sufficient averment that the complaint was *heard*. (k) And it has been holden, that an indictment for perjury, assigned on an affidavit sworn before the court, need not state that the affidavit was filed of record, or exhibited to the court, or in any manner used by the party. (l)

It is sufficient to state in the indictment that the defendant was *duly* sworn. (m) In a case where it was averred that he was *sworn on the gospels*, and he appeared to have been sworn according to the custom of his own country, without kissing the book, it was considered as a fatal variance; though it was holden that the averment was proved by its appearing that he was *previously* sworn in the ordinary mode. (n) An indictment for perjury in a cause tried at the assizes was holden good, although it alleged the oath to have been taken before one only of the Judges in the commission, and the *nisi prius* record imported that the trial was before the two Judges of assize. (o) An indictment at common law, which charged that the defendant "falsely, maliciously, wickedly, and corruptly swore, &c." was holden sufficiently to imply that the offence was committed *wilfully*; (p) but it was considered at the same time that, in an indictment on the statute 5 Eliz. c. 9., the offence must be laid expressly to have been wilfully committed. (q)

It must appear or be alleged in the indictment that the person by whom the oath was administered had competent power to administer it. Thus upon an indictment for perjury before a justice in swearing that I. S. had sworn twelve oaths, where the charge as stated did not import that the oaths were sworn in the

(i) May's case, *cor.* Buller, J., 1799. The learned Judge cited Beech's case, *ante*, note (h).

(k) *Rex v. Aylett*, 1 T. R. 70.

(l) *Rex v. Crossley*, 7 T. R. 315. Nor is it necessary to prove such facts. *Id. Ibid.* But it is otherwise when the proceeding is under the statute of Eliz. Stark. Crim. Plead. 121. And see 3 Stark. Evid. 1140. citing *Rex v. Taylor*, Skin. 403. where it was held that the bare making of the affidavit without producing or using it is not sufficient.

(m) *Rex v. M'Carthur*, *cor.* Kenyon, C. J., Peake's N. P. C. 155.

(n) *Id. Ibid.*

(o) *Rex v. Alford*, 1 Leach 150. Hil. T. 1777. MS., Bayley, J. But as to a record in the crown court, see

Rex v. Lincoln, *Ante*, 538., In Reg. v. Deman, 2 Ld. Raym. 1221., an exception was taken to an indictment; that it stated the trial at which the oath was taken to have been before the Lord Chief Baron and the associate, but stated the oath to have been before the Chief Baron, without the associate; and also, that the assignment of perjury differed from the oath, being before the Chief Baron and associate. But the objections were overruled; and the court held that the associate need not be mentioned in every part of the indictment where the Chief Baron was mentioned.

(p) As to the offence being *wilful*, see *ante*, 518.

(q) *Cox's case*, 1 Leach 71.

county for which the justice acted, Eyre, J., arrested the judgment; because as the charge did not so import the justice had no jurisdiction to administer the oath in question to the defendant. (r)

It is necessary that it should appear on the face of the indictment that the oath taken was *material* to the question depending. (s) But it is not necessary to set forth in the indictment so much of the proceedings of the former trial as will shew the materiality of the question on which the perjury is assigned; and it will be sufficient to allege generally that the particular question became a material question. (t) Thus statements, that, at a court of Admiralty session, J. K. was "in due form of law tried upon a certain indictment then and there depending against him" for murder, and that "at and upon the said trial it then and there became, and was made a material question," whether, &c. were holden to be sufficient averments that the perjury was committed on the trial of J. K. for the murder, and that the question on which the perjury was assigned was material on that trial. (u) If the materiality of the question evidently appears upon the record, as where the falsehood affects the very circumstance of innocence or guilt, or where the perjury is assigned on documents from the recital of which it is evident that the perjury was important, the express allegation may, it seems, be omitted. (x) And where, upon an indictment for perjury on a trial for felony, it did not appear that the matter sworn was material nor was it alleged that it was so, the Judges held, upon a case reserved, that if the original indictment had been set out, and it could plainly have been collected that the matter was material it would have been sufficient without an averment of materiality, but that as this was not the case, the indictment was bad. (y) So where upon an indictment for perjury committed in an answer in Chancery the perjury was assigned in defendant's denial in the answer of his having agreed upon forming an insurance company of which he was director &c. to advance 10,000*l.* for three years to answer any immediate calls, and there was no averment that this was material, nor did it appear for what purpose the bill was filed, or what was the prayer, the judgment was arrested. (z) It therefore seems to be settled that either it must appear upon the indictment that the matter in respect of which the perjury is assigned was material or it must be expressly alleged to have been so. But if the false oath has any tendency to prove or disprove the matter in issue, though but circumstantially; as, if the party wilfully mistake the

It must appear on the face of the indictment that the oath was material or it must be alleged that it was.

(r) *Rex v. Wood*, *Exeter*, 1723, MS. Bayley, J.

(s) *Rex v. Aylett*, 1 T. R. 69.

(t) *Rex v. Dowlin*, 5 T. R. 318.

(u) *Id. Ibid.*

(x) 2 Chit. Crim. L. 309.; citing Trem. P. C. 139, &c. and 7 T. R. 315.

(y) *Rex v. M'Keron*, East. T. 1792, MS. Bayley, J.

(z) *Rex v. Bignold*, Trin. T. 1824, MS. Bayley, J. The indictment was

shewn to Lord Gifford, Master of the Rolls, and Mr. Bell, King's Counsel, who both thought that upon the face of the indictment it could not be said whether the question was material or not; and the materiality of all questions in a Chancery suit depending upon the purpose for which the suit is instituted, the Court held that the indictment could not be supported. MS. Bayley, J.

The indictment must expressly contradict the matter sworn to by the defendant.

colour of a man's coat, or speak to the credit of another witness it will amount to perjury. (a)

It is also necessary that the indictment should expressly contradict the matter falsely sworn to by the defendant. And the general averment that the defendant falsely swore, &c. upon the whole matter, will not be sufficient: the indictment must proceed by particular averments, (or, as they are technically termed, by *assignments of perjury*;) to negative that which is false. It may be necessary to set forth the whole matter to which the defendant swore, in order to make the rest intelligible, though some of the circumstances had a real existence: but the word "falsely" does not import that the whole is false; and when the proper averments come to be made, it is not necessary to negative the whole but only such parts as the prosecutor can falsify, admitting the truth of the rest. (b) It is suggested that in negating the defendant's oath where he has sworn only to his *belief*, (c) it will be proper to aver that "*he well knew*" the contrary of what he swore. (d) It seems that an assignment of perjury may, in some instances, be more full than the statement of the defendant, which it is intended to contradict. Thus, where the fact in the affidavit, in which the defendant was charged to have perjured himself, was, that he never did, at any time during his transactions with the commissioners of the victualling-office, charge more than the usual sum of sixpence per quarter beyond the price he actually paid for any malt or grain purchased by him for the said commissioners as their corn-factor; and the assignment in the indictment, to falsify this, alleged that the defendant did charge more than sixpence per quarter *for and in respect of* such malt and grain so purchased; it was objected that the words *in respect of* might include lighterage, freight, and many collateral and incidental expences attending the corn and grain jointly with the charge for the corn or grain, and, that bearing such sense, defendant was not guilty of perjury: but the objection was overruled. (e)

It has been decided in a recent case that perjury cannot be legally charged and assigned by shewing that the defendant did on two different occasions make certain depositions contradictory to each other with an averment that each of them was made knowingly and deliberately, but without averring or shewing in which of the two depositions the falsehood consisted. The information stated that the defendant, before a committee of the House of Commons, being duly sworn, deliberately and knowingly, and of his own act and consent, did say, swear, and give in evidence, &c.: setting out the evidence so given. And then the count averred that the said defendant, at the bar of the House of Lords, being duly sworn, deliberately and knowingly, and of his own act and consent did say, swear, and give in evidence, &c.: setting out in like

(a) *Rex v. Griebel*, 12 Mod. 142. 310.

Rex v. Muscot, 10 Mod. 195. Stark. Evid. 1144.

(b) *Rex v. Perrott*, 3 M. & S. 385, 390, 391, 392. And see *ante*, 309,

(c) *Ante*, 518.

(d) 2 Chit. Crim. L. 312.

(e) *Rex v. Atkinson*, Dom. Proc. 1785. 5 Bac. Abr. *Perjury*, (C).

manner the latter evidence which was directly contrary to that given before the House of Commons, and concluded (after averments as to the identity of the persons and places referred to in the evidence on both occasions), and so the jurors aforesaid, do say that the said Edward Harris did commit wilful and corrupt perjury. And this was holden to be bad on motion in arrest of judgment. (*f*)

If there be any doubt on the words of the oath, which can be more clear and precise by a reference to some former matter, it may be supplied by an *innuendo*; the use of which is, by reference to preceding matter, to explain and fix its meaning more precisely: (*g*) but it is not allowed to add to, extend, or change the sense. (*h*) We have seen that, in a case of perjury committed in an affidavit, it was holden that a word which had been omitted by accident in the original document was improperly stated in the indictment, as though it had been in the original document, and that such word ought to have been inserted and explained by an innuendo. (*i*) In a case where an objection was taken to an indictment, that it added, by way of innuendo to the defendant's oath, "his house situate in the *Haymarket* in *St. Martin in the fields*;" without stating by any averment, recital, or introductory matter, *that he had a house in the Haymarket*; or, (even admitting him to have such a house,) that *his oath was of and concerning the said house*, so situated, the objection was over-ruled; on the ground that the innuendo was only a more particular description of the same house which had been previously mentioned. (*j*) And, in the same case, the oath of the defendant being that he was arrested upon the steps of his own door, an innuendo that it was the outer door was holden good. (*k*) Where an innuendo is introduced contrary to the rules which have been mentioned, and any use is made of it in the indictment, it cannot be rejected as surplusage, and it will be bad after verdict. (*l*) But if the innuendo, and the matter introduced by it, are altogether impertinent and immaterial, and can have no effect in enlarging the sense, it seems that they may be rejected as superfluous. (*m*)

In general the court will oblige the defendant to plead or demur to a defective indictment for perjury. (*n*) And they are also very cautious in granting a certiorari to remove it. (*o*) And it appears that Lord Thurlow refused permission to amend an answer where an indictment for perjury had only been threatened, even where the party, having no interest, could not be supposed to take the false oath intentionally. (*p*) In a late case, Abbott, Ld. C. J., said

Of the *innuendo*.

The court will, in general, oblige the defendant to plead or demur to a defective indictment.

(*f*) *Rex v. Harris*, 5 B. & A. 926. It should have been averred and shewn in which of the two depositions the falsehood consisted.

(*g*) *Rex v. Aylett*, 1 T. R. 70. *Rex v. Taylor*, 1 Campb. 404.

(*h*) *Rex v. Griep*, 1 Lord Raym. 256. 2 Salk. 513. And see as to the use of an innuendo, 1 Saund. 243, note (4). 1 Chit. on Plead. 382, 383. 1 Stark. Crim. Plead. 108, *et sequ.*

(*i*) *Rex v. Taylor*, 1 Campb. 404. *Ante*, 538.

(*j*) *Rex v. Aylett*, 1 T. R. 70.

(*k*) *Id. Ibid.*

(*l*) *Rex v. Griep*, 1 Ld. Raym. 260.

(*m*) *Roberts v. Camden*, 9 East. 95. 2 Chit. Crim. L. 311.

(*n*) 2 Hawk. P. C. c. 25. s. 146.

(*o*) 2 Hawk. P. C. c. 27. s. 28.

(*p*) *Brown's Chan. Cas.* 419.

that, inasmuch as the objection taken to an indictment for perjury appeared upon the record, he did not feel himself warranted in taking notice of it at nisi prius. (q)

Plea of *autrefois acquit*.

The right of the defendant to plead a plea of *autrefois acquit* came under the consideration of the Court of King's Bench in the following case. The defendant was indicted in *Middlesex*, for perjury committed in an affidavit; which indictment, after setting out so much of the affidavit as contained the false oath, concluded, with a *prout patet*, by the affidavit filed in the Court of King's Bench, at Westminster, &c. and on this he was acquitted; after which he was indicted again in *Middlesex*, for the same perjury, with this difference only, that the second indictment set out the jurat of the affidavit, in which it was stated to have been sworn in *London*; which was traversed by an averment that, in fact, the defendant was so sworn in *Middlesex*, and not in *London*: and the Court of King's Bench held, that he was entitled to plead *autrefois acquit*, as the *jurat* was not conclusive as to the place of swearing; and the same evidence as to the real place of swearing the affidavit might have been given under the first as under the second indictment; and, therefore, the defendant had been once before put in jeopardy for the same offence. (r)

Trial. Jurisdiction of quarter sessions.

With respect to the trial of perjury it may be observed, that the courts of quarter sessions have no jurisdiction over the offence at common law, though they have jurisdiction over it under the statute 5 Eliz. c. 9. (s) The difficulties of proceeding upon that statute have been before adverted to; (t) so that the safer and most usual mode of proceeding is by indictment at the assizes, or in the King's Bench. And indictments for perjury at common law, preferred at the quarter sessions, appear to have been quashed for want of jurisdiction. (u)

Summary proceeding.

Where a person made an affidavit in the Court of Common Pleas, and afterwards, being summoned to appear in court, came there, and confessed it to be false, the court recorded his confession, and ordered that he should be taken into custody, and put in the pillory. (v) In answer to the objections of the defendant's counsel to this proceeding, it was argued that it was fully justified under the 5 Eliz. c. 9., and that even if the court could not punish the defendant by virtue of that statute, he might be punished at common law, on the ground that any court might punish such a criminal for an offence committed in *facie curiæ*. (w)

Evidence. One witness not sufficient.

The evidence of one witness is not sufficient to convict the defendant on an indictment for perjury; as in such case there would

(q) *Rex v. Souter*, 2 Stark. R. 423. The objection was, that the indictment was drawn in the compendious manner prescribed by the 23 Geo. 2. c. 11.; and yet no count alleged that the question upon the answers to which perjury was assigned was material.

(r) *Rex v. Embden*, 9 East. 437.

(s) 1 Hawk. P. C. c. 69. s. 14. note (3). 2 Hawk. P. C. c. 8. s. 38. *Rex*

v. Higgins, 2 East. R. 18, *ante*, 371. 3 Burn. Just. tit. *Perjury*, &c. 1.

(t) *Ante*, 533.

(u) 3 Burn. Just. tit. *Perjury*, &c. *Rex v. Bainton*, 2 Str. 1088. *Rex v. Westiness*, *id. ibid.* 1 Chit. Crim. L. 301.

(v) *Rex v. Thorogood*, 8 Mod. 179.

(w) *Id. ibid.*; and *Bushel's case*, Vaugh. 152. was cited.

be only one oath against another. (x) But this rule must not be understood as establishing that two *witnesses* are necessary to disprove the fact sworn to by the defendant, for if any material circumstance be proved by other witnesses, in confirmation of the witness who gives the direct testimony of perjury, it may turn the scale, and warrant a conviction. (y) And the rule does not apply where the evidence consists of the contradictory oath of the party accused. Thus, in a case where the defendant had been convicted of perjury, charged in the indictment to have been committed in an examination before the House of Lords, and the only evidence was a contradictory examination of the defendant before a committee of the House of Commons, application was made for a new trial, on the ground that in perjury two witnesses were necessary, whereas in that case only one witness had been adduced to prove the *corpus delicti*, namely, the witness who deposed to the contradictory evidence given by the defendant before the committee of the House of Commons, and further, it was insisted, that mere proof of a contradictory statement by the defendant on another occasion was not sufficient, without other circumstances, shewing a corrupt motive, and negating the probability of any mistake. But the Court held that the evidence was sufficient, *the contradiction being by the party himself*, and that the jury might infer the motive from the circumstances, and the rule was refused. (z) And the same principle appears to have been acted upon in a former case. The defendant had first made his information upon oath before a Justice of the peace, that three women were concerned at a riot at his mill (which was dismantled by a mob on account of the price of corn), and afterwards, at the sessions, when the rioters were indicted, he was examined concerning those women, and (having been tampered with in their favour,) he then swore they were not in the riot. There was no other evidence on the trial of the defendant for this perjury, to prove that the women were in the riot (which was the perjury assigned) but the defendant's own original information on oath, which was produced and read, and by which he had sworn that they were in the riot. And the Judge thought this evidence sufficient, and the defendant was convicted and transported. (a) And with respect to this evidence, it has been observed, that when the same person has by opposite oaths asserted and denied the same fact, the one seems sufficient to disprove the other; and with respect to the defendant (who cannot contradict what he himself has sworn) is a clear and decisive proof, and will warrant the jury in convicting him on either, for whichever is given in evidence to disprove the other, it can hardly be in the defendant's

(x) Reg. v. Muscot, 10 Mod. 193.
4 Black. Com. 358. Peake on Evid.
10. Phil. on Evid. 112.

(y) Rex v. Lee, Mich. 6 Geo. 3.
MS. Bayley, J., Phil. Evid. 143.

(z) Rex v. Knill, 5 B. & A. 929.
note (a).

(a) Anon. cor. Yates, J., Lancaster

Sum. Ass. 1764. And afterwards,
Lord Mansfield, C. J., and Wilmot,
J., and Aston, J., to whom Yates, J.,
stated the reasons of his judgment,
concurred in his opinion. Notes to
Rex v. Harris, 5 B. & A. 939, 940,
MS. Bayley, J.

mouth to deny the truth of that evidence, as it came from himself.(b)

Party prejudiced by the perjury a competent witness.

Though the contrary doctrine appears at one time to have prevailed,(c) it is now well established that the party prejudiced by the perjury is a competent witness to prove the offence.(d) And, though at one time it was considered necessary to shew that such party had satisfied the judgment in the suit in which the perjury was committed before he could be admitted as a witness;(e) on the ground that he might possibly make use of a conviction for the purpose of obtaining relief in equity against the judgment; yet, as it is now an established rule that a court of equity will not grant relief on a conviction which proceeds on the evidence of the prosecutor,(f) it is observed that there can be no objection to his being admitted a witness.(g) And even if the indictment proceed upon the statute 5 Eliz. c. 9.(h) which gives the prosecutor half the forfeiture incurred, it is conceived that, as in action to recover his moiety he would be precluded from giving the conviction in evidence, there would be no objection to his competency.(i)

Witness who has before sworn to the same fact, or is himself indicted for perjury.

It has been ruled to be no objection to the competency of a witness on an indictment for perjury, committed in an answer in Chancery, that, in his answer to a cross-bill, he has sworn to the same fact which he is called to prove upon the indictment.(k) And if several persons are separately indicted for perjury in swearing to the same fact, either of them, before conviction, may be a witness on the trial of the other.(l)

Proof of the defendant having sworn in substance and effect.

It has been holden, that if a count in an indictment for perjury undertake to set out continuously the *substance and effect* of what the defendant swore when examined as a witness, it is necessary, in support of this count, to prove, that *in substance and effect* he swore the whole of that which is thus set out as his evidence, although the count contains several distinct assignments of perjury. It was urged in support of the prosecution that *reddendo singula singulis*, the defendant was charged with swearing separately in answer to all the questions that were mentioned. But Lord Ellenborough, C. J., said, "Suppose you had undertaken to set out the *tenor* of what the defendant swore, and it should appear by the evidence that he had not sworn a material part of that which was set out, would not this have been fatal? Having taken upon you to state the *substance and effect* of what he swore, you are not bound down to precise words;—but must you not prove that he swore in substance and effect the whole

(b) From the Precedent-book of Chambre, J., cited 5 B. & A. *ibid*.

(c) Rex v. Whiting, 1 Salk. 283. 1 Ld. Raym. 596. Rex v. Nunez, 2 Str. 1043. Rex v. Ellis, *id*. 1104. 2 Hawk. P. C. c. 46. s. 24. Bull. N. P. 289.

(d) Rex v. Broughton, 2 Str. 1230. Abraham, q. t. v. Bunn, 4 Burr. 2255. Rex v. Boston, 4 East. 581.

(e) Rex v. Eden, 1 Esp. 97. Rex v.

Dalby, Peake N. P. C. 12.

(f) Bartlett v. Pickersgill, 4 Burr. 2255. Smith v. Prager, 7 T. R. 60. Rex v. Boston, 4 East. 577.

(g) Phil. on Evid. 92.

(h) *Ante*, 523.

(i) Phil. on Evid. 92, 93.

(k) Rex v. Pepys, Peake N. P. C. 138.

(l) 2 Hale P. C. 280.

“that you have stated? You aver that part of the defendant’s evidence concerning the assurance given by Lord Headley to be material, and you have not proved that he swore to any such assurance. Did you ever know the rule of *reddendo singula singulis* applied to a misrecital? Is there any authority to shew, that under *secundum substantiam*, you are not bound to prove the *substance* of what you state, as under *secundum tenorem*, you are bound to prove the *tenor*? To hold otherwise, would be to introduce a most dangerous latitude into criminal proceedings. I am decidedly of opinion that you have failed in the proof of a substantial allegation. It is essential to the security of innocence, that words set out in the record should be either literally or substantially proved. A person giving his assurance generally, and giving his assurance for the performance of a particular stipulation, are allowed to be entirely different. If a man swears falsely to several material questions, these may be included in distinct counts.”(m)

It appears to have been ruled, that upon an indictment for perjury committed at the trial of a cause, the prosecutor must prove *the whole* of the defendant’s testimony; (n) unless the perjury be assigned upon a point which first arose upon the defendant’s cross examination, in which case proof of the whole cross-examination has been ruled to be sufficient.(o) And the ground upon which proof of the *whole* of the examination, or cross-examination, was ruled to be necessary in these cases appears to have been, that possibly the defendant might have corrected in some part of such examinations any mistake he had made in other parts. But, it is observed, that this doctrine of compelling the prosecutor to prove more than a *prima facie* case, is an anomaly in the criminal law, that in general the party indicting is not bound to anticipate matters of defence, which it lies on the prisoner to bring forward; and that it does not seem that, in this case, the party indicted would sustain hardship in being compelled to shew that he had corrected the part of his evidence assigned.(p) And it is said by another learned writer, that at most the rule seems to amount to this, that all the evidence given by the defendant, in reference to the particular fact on which perjury is assigned, ought to be proved.(q) And the rule hardly seems to be necessary for the protection of the defendant, as it will be open to him to cross-examine the witness by whom his

Proof of the whole of the defendant’s testimony.

(m) *Rex v. Leefe*, 2 Campb. 134, 139. The learned reporter says, “I find no decision or dictum in the books as to the evidence of the words sworn which is necessary to support an indictment for perjury. For the general principles upon this subject, *vide* 2 Hawk. P. C. c. 46. s. 34, 35, 36. *Compagnon v. Martin*, 2 Bl. Rep. 790.”

(n) *Rex v. Jones*, *cor.* Kenyon, C. J., 1791. Peake N. P. C. 37.

(o) *Rex v. Dowlin*, *cor.* Kenyon, C. J., 1793, Peake N. P. C. 170.

(p) 2 Chit. Crim. L. 312. referring to 1 Sid. 418. Carr’s case.

(q) 3 Stark. Evid. 1142. And the author further observes, that the rule even to this effect appears to be a doubtful one; for when it has once been proved that particular facts, positively and deliberately sworn to by the defendant in any part of his evidence, were falsely sworn to, it seems in principle to be incumbent on him to prove, if he can, that in other parts of his testimony he explained or qualified that which he had so sworn.

statements upon oath are proved, whether he did not in some other parts of his evidence correct or explain those statements upon which the prosecution is founded, and unless the witness can positively deny any such correction or explanation, or if he admits that they may have occurred, the proof would probably be deemed insufficient for a conviction. And it will of course be open to the defendant to prove that any corrections or explanations were given by him in other parts of his evidence.(r)

Proof of authority to administer the oath.

It is sufficient to support the averment that the party administering the oath had competent authority for that purpose, by shewing in the first instance that he *acted* as a person having such authority. Thus, upon an indictment for perjury before a surrogate in the ecclesiastical court, it was ruled, that the fact of the person who administered the oath having acted as a surrogate, was sufficient *prima facie* evidence of his having been duly appointed, and having authority to administer it. And Lord Ellenborough, C. J., said, "I think the fact of Dr. Parson having acted as surrogate is sufficient *prima facie* evidence that he was duly appointed and had competent authority to administer the oath. "I cannot for this purpose make any distinction between the ecclesiastical courts and other jurisdictions. It is a general presumption of law, that a person acting in a public capacity is duly authorised so to do."(s) But it was holden, in the same case, that upon its appearing that the surrogate was appointed contrary to the canon, (which requires that no judicial act shall be speeded by any ecclesiastical Judge, unless in the presence of the registrar or his deputy, or other persons by law allowed in that behalf,) his appointment was a nullity, and the averment that he had authority to administer the oath was negatived.(t)

The oath must be proved as alleged.

The taking the oath must be proved as it is alleged. Therefore, if it be averred that the defendant was sworn upon the Holy Gospels, &c. and it turn out that he was sworn in some other manner, according to some particular custom, and not upon the Gospels, the variance will be fatal.(v) But a variance as to the place of taking will not be material, if it be proved to have been taken in the county where the defendant is indicted.(x) And upon an indictment in Middlesex, it may be shewn that the oath was in fact taken in Middlesex, although the jurat state it to have been sworn in London.(y)

Proof against a bankrupt.

It seems that on an indictment against a bankrupt for perjury, before the commissioners, in passing his last examination, it is necessary to give strict evidence of the trading, petitioning creditor's debt, and act of bankruptcy.(z) For where the authority delegated is of a special nature, limited to particular circumstances, it is essential to prove their existence, in order to shew the authority to administer the oath.(a)

(r) *Rex v. Carr*, Sid. 418.

(s) *Rex v. Verelst*, 3 Campb. 432.

(t) *Id. Ibid.*

(v) 3 Stark. Evid. 1140. *Rex v. M'Arthur*, Peake's C. 155.

(x) *Rex v. Taylor*, Skin. 403.

(y) *Rex v. Emuden*, 9 East. 437. 3

Stark. Evid. 1140.

(z) *Rex v. Punshon*, 3 Campb. 96. And see *Rex v. Bullock*, 1 Taunt. 71.

(a) 3 Stark. Evid. 1135. If the defendant was not a bankrupt, there was no authority to administer the oath. But the case might admit of a

On an indictment for perjury, in an answer in chancery, the bill must be proved in the usual way; and proof of the defendant's signature, and of that of the master before whom the answer purports to be sworn, is evidence of the defendant's having sworn to the truth of the contents, without calling the person who wrote the jurat; or further proving the identity of the defendant as being the very same person who had signed the answer. (b) But unless there be such proof of the defendant's signature, or some other sufficient proof to identify him as the person by whom the oath was taken, no return of commissioners, or of a master in Chancery, will be sufficient. (c) In a case upon the statute 31 Geo. 2. c. 10. s. 24. (for taking a *false oath* to obtain administration to a seaman's effects, in order to receive his wages) it was holden necessary to prove, directly and positively, that it was the prisoner who took the oath. And the Court said that the evidence given was defective, as there was a possibility, from any thing that had been given in evidence to the contrary, that the prisoner might have gone through all the rest of the fraud, and have avoided the circumstance of taking the oath, especially as he probably knew that the taking the oath was a capital felony. And they further said, that if this had been an indictment for perjury at common law, it would have been incumbent on the prosecutor to have given precise and positive proof that the prisoner was the person who took the oath; and it was equally incumbent on him so to do, upon an indictment on the statute in question. (d)

Proof of the defendant having taken the oath in an answer in chancery, or upon obtaining administration of a seaman's effects.

If the perjury was committed on the trial of a cause at Nisi Prius, the record ought to be produced, in order to shew that such a trial was had: but the production of the *postea* will be sufficient for this purpose. (e) And, in addition to the production of the record, the previous evidence and state of the cause should be so far proved as to shew that the matter sworn to was material: and the prefatory circumstances and innuendoes averred in the indictment for the purpose of shewing such materiality must also be proved. The record will shew what issues were joined between the parties; but such proof must be given of what occurred at the trial as will shew the bearing and materiality of the defendant's evidence. (f)

Proof of Nisi Prius record.

It seems that if a party produce an affidavit, purporting to have been made by him before commissioners in the country, and make use of it in a motion in the cause, it will be evidence against him that he made it. (g)

Upon an indictment for perjury, in falsely taking the free-

Proof of taking the free-

different consideration, where the perjury is assigned upon the deposition of a witness who comes to prove the bankruptcy; for there the commissioners have jurisdiction to enquire into the fact, though it should ultimately turn out that there was no bankruptcy. *Id. ibid.*

(b) *Rex v. Benson*, 2 Campb. 508. *Rex v. Morris*, 2 Burr. 1189. 1 Leach 50. The reason why the Court of Chancery made a general order that

all defendants should *sign* their answers was with a view to the more easy proof of perjury in answers. 2 Burr. 1189.

(c) *Id. ibid.*

(d) *Brady's case*, 1784, 1 Leach 327.

(e) *Rex v. Iles*, Hard. 118. Bul. N. P. 243. 2 Hawk. P. C. c. 46. s. 56. 3 Stark. Evid. 1136.

(f) 3 Stark. Evid. 1143.

(g) *Rex v. James*, Show. 97. 3 Stark. Evid. 1140.

holder's oath
at an election.

holder's oath at an election of a knight of the shire, *in the name of J. W.*; it appearing by competent evidence that the freeholder's oath was administered to a person who polled on the second day of the election, by the name of J. W. who swore to his freehold, and place of abode; and that there was no such person; and that the defendant voted on the second day, and was no freeholder, and sometime afterwards boasted that he had *done the trick*, and was not paid enough for the *job*, and was afraid that he should be pulled for his *bad vote*; and it not appearing that more than one false vote was given on the second day's poll, or that the defendant voted in his own name, or any other than the name of J. W.; it was holden, that there was sufficient evidence for the jury to presume that the defendant voted *in the name of J. W.* and consequently to find him guilty of the charge as alleged in the indictment. (*h*)

If any one distinct assignment of perjury be proved, the defendant ought to be convicted. (*i*)

Proof upon a
prosecution
for suborna-
tion of per-
jury.

In a case of a prosecution against T. Reilly for suborning one Macdaniel to commit perjury, it was contended, on the part of the crown, that the bare production of the record of Macdaniel's conviction was of itself sufficient evidence that he had, in fact, taken the false oath as alleged in the indictment. But it was insisted, for the prisoner, that the record was not of itself sufficient evidence of the fact; that the jury had a right to be satisfied that such conviction was right; that Reilly had a right to controvert the guilt of Macdaniel; and that the evidence given on Macdaniel's trial ought to be submitted to the consideration of the present jury; and the recorder obliged the counsel for the crown to go through the whole case, in the same manner as if the jury had been charged to try Macdaniel. (*k*)

Punishment of
perjury and
subornation of
perjury.

The punishment of perjury and subornation of perjury, at common law, has been various; being anciently death; afterwards banishment, or cutting out the tongue; then forfeiture of goods. (*l*) At the present time it is fine, imprisonment, and pillory, at the discretion of the Court, (*m*) to which, as we have seen, the statute

(*h*) *Rex v. Price*, alias Wright, 6 East. 323.

(*i*) *Rex v. Rhodes*, 2 Lord Raym. 186, 187. 3 Stark. Evid. 1145. And see *Compagnon v. Martin*, 2 Black. Rep. 790.

(*k*) *Reilly's case*, 1 Leach 454.

(*l*) 4 Black. Com. 138.

(*m*) 4 Black. Com. 138. *Rex v. Nueys and Galey*, 1 Black. R. 416. *Rex v. Lookup*, 3 Burr. 1901. In this last case the form of the sentence was that the defendant "should be set in " and upon the pillory at C. cross, " for an hour between the hours of " twelve and two, and that he should " afterwards be transported to some " of his Majesty's colonies or planta- " tions in America, for the space of " seven years; and be now remanded " to the custody of the marshal, to be

" by him kept in safe custody, in ex- " cution of the judgment aforesaid, " and until he shall be transported as " aforesaid."

The statute 56 Geo. 3. c. 138. s. 1. after abolishing the punishment of the pillory except for the offences thereafter mentioned proceeds thus; " Provided that all laws now in force " whereby any person is subject to " punishment for the taking any false " oath, or for committing any man- " ner of wilful and corrupt perjury, " or for the procuring or suborning " any other person so to do, or for " wilfully, falsely, and corruptly af- " firming or declaring, or procuring " or suborning any other person so to " affirm and declare, in any matter or " thing, which if the same had been " deposed in the usual form would

2 Geo. 2. c. 25.(n) superadds a power for the Court to order the offender to be sent to the house of correction for a term not exceeding seven years, or to be transported for the same period; and makes it felony, without benefit of clergy, to return or escape within the time. If the prosecution proceeds upon the 5 Eliz. c. 9. that statute, as we have seen,(o) inflicts the penalty of perpetual infamy, and a fine of 40*l.* on the suborner; and, in default of payment, imprisonment for six months, and to stand with both ears nailed to the pillory; and punishes perjury itself with six months' imprisonment, perpetual infamy, and a fine of 20*l.* or to have both ears nailed to the pillory.

It has been holden that the punishments directed by the stat. 18 Geo. 2. c. 18.(p) to be inflicted upon perjury, in falsely taking the freeholder's oath at an election of a knight of the shire, are cumulative under the statute 5 Eliz. c. 9. s. 6.(q) and 2 Geo. 2. c. 25. s. 2.(r) to which the first mentioned statute 18 Geo. 2. c. 18. refers.(s)

A consequence of a conviction for perjury, though it forms no part of the judgment, is, that the offender is incapacitated from giving evidence in a court of justice.(t) But a pardon will restore his competency; except in the case of a conviction for perjury or subornation of perjury on the statute 5 Eliz. c. 9.(u) which provides that the offender shall never be admitted to give evidence in courts of justice until the judgment be reversed; and, therefore, the King's pardon will not in such case make him a competent witness.(x)

Conviction for perjury incapacitates the offender from giving evidence.

A very summary mode of proceeding is given, where persons convicted of perjury practise as attornies or solicitors in courts of law or equity. The 12 Geo. 1. c. 29. s. 4. enacts, "that if any "person who hath been or who shall be convicted of forgery, or "of wilful and corrupt perjury, or subornation of perjury, or "common barratry, shall act or practise as an attorney, or solicitor "or agent, in any suit or action, brought or to be brought in any "court of law or equity within that part of Great Britain called

Summary proceeding where persons convicted of perjury practise as attornies or solicitors.

"have amounted to wilful and corrupt perjury, shall continue and be "in full force and effect; and that all "persons guilty of any of the said "several offences shall incur and suffer the same punishment, penalties, "and forfeitures as such persons were "subject to by the laws and statutes "of this realm, or any of them, before the passing of this act, and as "if this act had not been made."

(n) *Ante*, 525.

(o) *Ante*, 523, 524.

(p) *Ante*, 531.

(q) *Ante*, 523, 524.

(r) *Ante*, 525.

(s) *Rex v. Price, alias Wright*, 6 East. 327. Grose, J., passed sentence upon the defendant and two other persons who had been convicted of similar perjuries in the following form:—"That each of them for this

"offence should lose and forfeit 20*l.* "and be imprisoned in Newgate by "the space of six months without "bail or mainprize, and that his oath "from thenceforth be not received in "any court of record within England "or Wales, or the marches of the "same, until such time as this judgment should be reversed by attain "or otherwise; and that after the expiration of the said six months he "be transported to such place beyond "the seas as his Majesty, with the "advice of his privy council, should "think fit to direct and appoint, for "term of six years."

(t) *Gilb. Ev.* 126. *Bull. N. P.* 291. 4 *Black. Com.* 138. 2 *Hawk. P. C. c.* 46. s. 101.

(u) *Ante*, 523, 524.

(x) *Phil. on Ev.* 30. and the authorities there cited.

“ England, the Judge or Judges of the court, where such suit or
“ action is or shall be brought, shall, upon complaint or informa-
“ tion thereof, examine the matter in a summary way in open
“ court; and if it shall appear to the satisfaction of such Judge or
“ Judges, that the person complained of, or against whom such
“ information shall be given, hath offended contrary to this act,
“ such Judge or Judges shall cause such offender to be trans-
“ ported for seven years to some or one of his Majesty’s colonies
“ or plantations in America, by such ways, means, and methods,
“ and in such manner, and under such pains and penalties as
“ felons in other cases are by law to be transported.”

CHAPTER THE SECOND.

OF CONSPIRACY.

THE conspiring to obstruct, pervert, or defeat the course of public justice ; (a) to injure the public health, as by selling unwholesome provisions ; (b) or to effect any public mischief, as by raising the price of the public funds by illegal means ; (c) are offences punishable by indictment. And it appears that an indictment lies, not only wherever a conspiracy is entered into for a corrupt or illegal purpose, but also where the conspiracy is to effect a legal purpose by the use of unlawful means: and this, although such purposes be not effected. (d) And it is laid down in a book of great authority that all confederacies whatsoever wrongfully to prejudice a third person are highly criminal at common law ; as where divers persons confederate together by indirect means to impoverish a third person, or falsely and maliciously to charge a man with being the reputed father of a bastard child, or to maintain one another in any matter, whether it be true or false. (e) The conspiracy or unlawful agreement, though nothing be done in prosecution of it, is the gist of the offence. (f) The nature of conspiracy, therefore, requires that more than one person should be concerned in it. In many cases an agreement to do a certain thing has been considered as the subject of an indictment for a conspiracy, though the same act, if done separately by each individual without any agreement amongst themselves, would not have been illegal; as in the case of journeymen conspiring to raise their wages; each may insist

Descriptions
of conspiracy.

(a) *Rex v. Mawbey and others*, 6 T. R. 619. *et sequ.* 4 Black. Com. 136. 1 Hawk. P. C. c. 72. s. 2.

(b) *Reg. v. Macarty and Forden-bourgh*, 2 Ld. Raym. 1179. 2 East. P. C. c. 18. s. 5. p. 823. 4 Black. Com. 162. And see the remarks upon the case of *Macarty and Forden-bourgh* in 6 East. 133. 141.

(c) *Rex v. De Berenger and others*, 3 M. & S. 67.

(d) *Rex v. The Journeymen Tailors of Cambridge*, 8 Mod. 11. *Reg. v. Best*, 2 Ld. Raym. 1167. 6 Mod. 85. 1 East. P. C. c. 11. s. 11. p. 462. But

an *action* will not lie for a conspiracy, unless it be put in execution, 9 Co. 57. *W. Jones*, 93. *Savile v. Roberts*, 1 Ld. Raym. 378. And see 8 Mod. 320. that conspiring to do a lawful act, if for an unlawful end is indictable.

(e) 1 Hawk. P. C. c. 72. s. 2. It is not necessary in an indictment for conspiring to charge a man with being the father of a bastard child, to state that the charge was false, *Reg. v. Best*, *post.* 561.

(f) *Reg. v. Best*, 2 Ld. Raym. 1167. *Rex v. Spragg*, 2 Burr. 993. *Rex v. Rispal*, 3 Burr. 1321.

on raising his wages if he can; but if several meet for the same purpose it is illegal, and the parties may be indicted for a conspiracy. (g) It has been said that perhaps few things are left so doubtful in the criminal law, as the point at which a combination of several persons, in a common object, becomes illegal. (h) It appears, however, to have been holden that if such persons illegally concur in doing an act, they may be guilty of conspiracy, though they were not previously acquainted with each other. (i)

Conspiracies against the public justice of the kingdom by agreeing to make false charges and accusations.

Amongst the most flagrant instances of conspiracies, against the public justice of the kingdom, may be mentioned a case in which the defendants were charged with conspiracy, in causing a man to be executed for a robbery, which they knew he was innocent of, with intent to get into their possession the reward offered by act of parliament. (k) And it would have been equally a conspiracy, though the defendants had failed in their infamous design, and the man had been acquitted. Indeed one of the more ancient descriptions of conspiracy is "a consultation and agreement between two or more to appeal, or indict an innocent person falsely and maliciously of felony, whom, accordingly, they cause to be indicted or appealed; and afterwards the party is lawfully acquitted by the verdict of twelve men." (l) But of this description it is observed, that the lawful acquittal of the party grieved does not appear to be required in order to make the offenders guilty of conspiracy. (m) The description of conspirators in the old statute, 33 Edw. 1. st. 2. (sometimes cited as 21 Edw. 1.) is "that conspirators be they that do confeder or bind themselves by oath, covenant, or other alliance, that every of them shall aid and bear the other falsely and maliciously to indict, or cause to indict, or falsely to move and maintain pleas; and also such as cause children within age, to appeal men of felony, whereby they are imprisoned and sore grieved; and such as retain men in the country with liveries or fees for to maintain their malicious enterprizes; and this extendeth as well to the takers as to the givers; and to stewards and bailiffs of great lords, who, by their seigniorie, office, or power, undertake to bear or maintain quarrels, pleas, or de-

(g) By Grose, J., in *Rex v. Mawbey and others*, 6 T. R. 636. And see *Rex v. The Journeyman Tailors of Cambridge*, 8 Mod. 11. If one man alone be guilty of an offence, which, if practised by two, would be the subject of an indictment for a conspiracy, he is civilly liable in an action for reparation of damages at the suit of the person injured. By Buller, J., in *Pasley v. Freeman*, 3 T. R. 58.

(h) 3 Chit. Crim. L. 1130.

(i) By Lord Mansfield in the case of the prisoners in the King's Bench, Hil. T. 26 Geo. 3. 1 Hawk. P. C. c. 72. s. 2. in the notes.

(k) *Rex v. Macdaniel and others*, 1 Leach 45. And see *Post* 130. See also *ante*, Vol. I. p. 427. It should seem that the only objection to this being treat-

ed as a conspiracy is that which might arise from its being considered as a crime of the highest degree, in which the misdemeanor would be merged.

(l) 3 Inst. 143. 4 Black. Com. 36.

(m) 1 Hawk. P. C. c. 72. s. 2. In the case of *Rex v. Spragg*, 2 Burr. 998. Serj. Davy said "There is a distinction between a writ of conspiracy and an indictment for a conspiracy. In an action the damage is the gist of the action; and therefore, the writ and declaration must charge 'that he was indicted and sustained damage:' but that is not necessary in an indictment; which is for an offence against the public. And this distinction explains Lord Coke's meaning in 3 Inst. 143."

“bates, that concern other parties than such as touch the estate of “their lords or themselves.” From which definition of conspirators it is said that it seems clearly to follow that not only those who actually cause an innocent man to be indicted, and also to be tried upon the indictment, whereupon he is lawfully acquitted, are properly conspirators, but that those also are guilty of this offence, who barely conspire to indict a man falsely and maliciously, whether they do any act in prosecution of such conspiracy or not; for the words of the statute seem expressly to include all such confederacies under the notion of conspiracy, whether there be any prosecution or not.⁽ⁿ⁾ But it is also said that since it does not appear to have been solemnly resolved that persons offending by a false and malicious accusation against another, are indictable upon this statute, it seems to be more safe and adviseable to ground an indictment for such offence upon the common law than upon the statute.^(o)

A conspiracy of this kind appears therefore, to consist in the unlawful agreement to injure a person by a false charge; though it be in no way prosecuted. And whether the conspiracy be to charge a temporal or an ecclesiastical offence on an innocent person, it is the same thing. ^(p)

It seems not to be any justification of a confederacy to carry on a false and malicious prosecution, that the indictment or appeal, which was preferred, or intended to be preferred, in pursuance of it, was insufficient, or that the court wherein the prosecution was carried on or designed to be carried on, had no jurisdiction of the cause, or that the matter of the indictment did import no manner of scandal, so that the party grieved was, in truth, in no danger of losing either his life, liberty, or reputation. For notwithstanding the injury intended to the party against whom such a confederacy is formed may perhaps be inconsiderable, yet the association to pervert the law, in order to procure it, seems to be a crime of a very high nature, and justly to deserve the resentment of the law. ^(q) Therefore, on an indictment for wickedly and unlawfully conspiring to accuse another of taking hair out of a bag, without alleging it to be an unlawful and felonious taking, it was said by Lord Mansfield that the gist of the offence was the unlawful conspiracy to do an injury to another by a false charge, and that whether the conspiracy be to charge a man with criminal acts, or such only as may affect his reputation, it is sufficient. ^(r)

Neither is it any plea for one who is prosecuted for such an unlawful confederacy, that nothing more was intended by him, but only to give his testimony in a legal course of justice against the party to whose prejudice such confederacy is supposed to have been formed; for notwithstanding it may be said that it would be a great discouragement to legal proceedings to make persons liable to a

The false charge need not be prosecuted.

The confederacy to make false charges, &c. will be equally criminal, though the proceedings intended to be instituted were defective.

Such confederacy will be equally criminal, though the parties may say that they intended only to give testimony in a legal course of justice.

(n) 1 Hawk. P. C. c. 72. s. 2.

(o) *Ibid.*

(p) 1 Hawk. P. C. c. 72. s. 2.

(q) 1 Hawk. P. C. c. 72. s. 2.

(r) Reg. v. Best and Another, 2

Lord Raym. 1167. 1 Salk. 174.

(q) 1 Hawk. P. C. c. 72. s. 3.

(r) Rex v. Rispal, 1 Black. R. 368.
3 Barr. 1320.

criminal prosecution, for barely intending to give their evidence, and it would be a prejudging of a cause to try the truth of the testimony intended to be given in it before the cause itself is determined, yet the law will rather venture this mischief than suffer so flagrant a villany to go unpunished. However, if there be any probability that the principal cause will ever be tried, it seems proper to apply to the court to stay the trial of the confederacy until the merits of the principal cause be determined. (s)

But the confederacy must be false and malicious; and persons may consult to prosecute a guilty person.

It is observed that it appears not only from the words of the statute, but also from the plain reason of the thing, that no confederacy whatsoever to maintain a suit can come within the words of the statute 33 Edw. 1. st. 2. unless it be both false and malicious. (t) And several persons may lawfully meet together and consult to prosecute a guilty person, or one against whom there is probable cause of suspicion; but not to prosecute one that is innocent, right, or wrong. (u)

Mawbey's case. Conspiracy to pervert the course of justice, by producing a false certificate of a highway being in repair.

In the following case, it was holden that a certificate by justices of peace, that an indicted highway is in repair, is a legal instrument, recognized by the courts of law, and admissible in evidence after conviction, when the court are about to impose a fine: and that, consequently, it was illegal to conspire to pervert the course of justice by producing a false certificate in evidence, to influence the judgment of the court. The indictment stated that a highway was indicted as being out of repair, and a plea of not guilty, but that it was intended to apply to withdraw the plea and plead guilty that two justices of the county, and two other persons conspired to pervert the course of justice, and impose on the court by producing a false certificate from the two defendants, who were justices, that the road was in repair, and that they did so. There was a verdict against the two justices, and a rule was obtained to arrest the judgment. Upon shewing cause against this rule the counsel for the prosecution went at large into a discussion of the doctrine and nature of conspiracies. He said, that it follows from the very nature of the offence of conspiracy that there is no charge of any specific crime: but it consists wholly in the unlawful combination; and this will appear fully by adverting to the several sorts of conspiracy, to be found in the books. 1. Where the subject matter is neither *malum prohibitum*, nor *malum in se*, as referred to the individual: but the criminality in law arises wholly from the conspiracy. Such is an agreement to maintain each other, right or wrong; (x) or a combination amongst labourers or mechanics to raise their wages. (y) So where several conspired to hiss at the Birmingham Theatre, Lord Mansfield held it indictable, although each might have done so separately. (z) So a combination between officers in the service of the East India Company, to resign their commissions, was held an illegal act; and consequently, a resignation tendered under those circumstances was

Argument of the counsel for the prosecution.

(s) 1 Hawk. P. C. c. 72. s. 4.

(t) 1 Hawk. P. C. c. 72. s. 7.

(u) Reg. v. Best and Another, 1 Salk. 174. And see 1 Hawk. P. C. c.

72. s. 7.

(x) 9 Co. 56.

(y) 8 Mod. 10.

(z) Anon. B. R. 18 or 19 Geo. 3.

held not to be a determination of the service. (a) 2. Where the subject matter is not *malum prohibitum*, as referred to the individual, though *malum in se*: but the criminality in law arises from the conspiracy; such as a malicious combination against a trader to ruin him in his trade. (b) So the taking up dead bodies, even though for the purposes of science in dissecting them, is now held an indictable offence *per se*; (c) yet formerly it was not so considered; but even then it was held that an indictment lay for conspiracy to do so. (d) A false indictment is no crime as referred to the individual; (e) but a conspiracy for that purpose subjects the offenders to the villainous judgment. (f) The private slander of another by an individual is not indictable; but conspiring to charge another with slanderous matter is so, (g) though no legal charge be actually preferred. (h) And in this latter case it was held that the quarter-sessions had jurisdiction over conspirators. It is the same with private immorality, which is only indictable when coupled with a conspiracy. (i) So two or more joining to do legal acts with a corrupt intent may be indicted. (k) And private deceits, coupled with a conspiracy, are indictable on that account. (l) 3. The third head of conspiracy is where the subject matter is *malum prohibitum*, as referred to the individual, and the criminality in law is thereby aggravated if executed. Of this nature is the bare attempt to subvert religion, (m) or public justice; and the latter will apply to both descriptions of counts in the indictment. Such also is the endeavour to dissuade witnesses from giving evidence, (n) or the preparation of witnesses; (o) or the tampering with jurors. (p) Such are public frauds in trade; (q) or public cheats, (r) or deceit, or collusion in the king's courts, or any consent thereto. (s) 4. Where there is a bare conspiracy unexecuted, (t) or where the conspiracy by the execution merges in a higher offence. (u) And he then argued that the offence

(a) 4 Burr. 2472.
(b) 1 Stra. 144. 1 Lev. 125. Rex v. Eccles and Others, B. R. 24 Geo. 3. post. 564.

(c) Rex v. Lynn, 2 T. R. 733.

(d) Rex v. Young, cited in 2 T. R. 733. This was an indictment for a conspiracy to prevent the burial of a corpse. And see a precedent for such a conspiracy, 2 Chit. Crim. L. 36.

(e) 1 Ed. 3. st. 2. c. 11. 2 Black. Rep. 1328, 9.

(f) *Ibid.* See as to the judgment. Post. 573.

(g) 1 Lev. 62. 1 Vent. 304.

(h) 1 Salk. 174. 1 Stra. 193. 3 Burr. 1320.

(i) 1 Salk. 382, 552. 3 Burr. 1434, 1878. 2 Lord Raym. 1031. 4 St. Tr. 515.

(k) Rex v. Robinson and Others, 1 Leach 37. 8 Mod. 321. 1 Wils. 41. 3 Burr. 1439.

(l) 6 Mod. 42, 301. 2 Burr. 1127. 2 Stra. 866.

(m) Fitzg. 66.

(n) 1 Hawk. P. C. c. 21. s. 15. 2 Stra. 904. And see Rex v. Steventon and Others, 2 East. R. 362.

(o) Hob. 271. 3 Inst. 106. 2 Show. 1.

(p) 1 Saund. 300. 1 Lord Raym. 148. 1 Burr. 510. Rex v. Joliffe, 4 T. R. 285. Co. Lit. 157.

(q) 1 Sess. Cas. 217. Comb. 16. 1 Sid. 409. 1 Ventr. 13.

(r) 5 St. Tr. 486. 1 Latch. 202. 1 Roll. Rep. 2. 2 Lord Raym. 865. 1 Barnard. 330.

(s) 3 Edw. 1. c. 29. 2 Inst. 212, 217.

(t) 1 Lev. 62, 125. 1 Vent. 304. 3 Burr. 1320. 1 Lord Raym. 379. 1 Salk. 174. 1 Stra. 193. T. Raym. 417.

(u) 1 Ld. Raym. 711.

Opinion of
the Judges.

charged against the defendants fell within the principles of the above cases. In giving his judgment in this case, Ashhurst, J., said, "The principal question is, whether a conspiracy to pervert the course of justice by producing in evidence a false certificate be or be not a crime? It seems to me that a greater offence can hardly be stated than that of obstructing or perverting the course of justice, on which the lives and properties of all the subjects depend." And Grose, J., said, "It is laid down in some of the cases, that an attempt to persuade another not to give evidence in a court of justice is indictable; then it cannot be doubted but that an attempt to mislead the court by misrepresentation is equally criminal. The course of justice is perverted if the certificate of the justices be false. If they agree to certify that a road is in repair for the purpose of perverting the course of justice, it is a crime and indictable; and it is not necessary that they should know at the time of such agreement that the road is out of repair; it is sufficient that they did not know that the fact which they certified to be true was true." And Lawrence, J., said, "The question is whether a conspiracy to do an act from which the public may receive any damage be or be not indictable? At first I thought this a very doubtful case, because it struck me that this was an act by which the public would not suffer, as the court at the assizes were not bound to receive the certificate of the defendants, it not being on oath. But on examination it appears that the practice of receiving the certificates of magistrates respecting the state of roads, has existed as far as the memory of living persons extends; and the books carry it still farther back. I have not been able to discover how or when the practice of receiving these certificates arose: but a practice that has been adopted in the courts at least as long back as the reign of Charles the First, goes a great way to shew what the law is upon the subject. And this is not the only instance of receiving certificates in evidence; certificates of bishops with respect to marriages are received; the customs of London are certified by the recorder; so formerly were certificates received from the captain of Calais; and in *Cro. Eliz.* 502, 3. this court said that they would give credit to the certificates of the Judges in Wales respecting the practice of their Court, and that the custom of the court is a law in that court." (x)

De Berenger's case.
Conspiracy to raise the price of the public funds, on a particular day by false rumours.

In a recent case it was holden to be an indictable offence, to conspire on a particular day by false rumours to raise the price of the public government funds, with intent to injure the subjects who should purchase on that day, and that the indictment was well enough, without specifying the particular persons who purchased as the persons intended to be injured, and that the public government funds of this kingdom might mean either British or Irish funds, which, since the Union, were each a part of the funds of the united kingdom. After the argument upon the motion in arrest of judgment, Lord Ellenborough, C. J., said, "I

(x) *Rex v. Mawbey and Others*, 6 T. R. 619 to 638.

"an perfectly clear that there is not any ground for the motion in arrest of judgment. A public mischief is stated, as the object of this conspiracy; the conspiracy is by false rumours to raise the price of the public funds and securities; and the crime lies in the act of conspiracy and combination to effect that purpose, and would have been complete, although it had not been pursued to its consequences, or the parties had not been able to carry it into effect. The purpose itself is mischievous, it strikes at the price of a vendible commodity in the market, and if it gives a fictitious price, by means of false rumours, it is a fraud levelled against all the public, for it is against all such as may possibly have any thing to do with the funds on that particular day." Bayley, J., said, "It is not necessary to constitute this an offence, that it should be prejudicial to the public in its aggregate capacity, or to all the king's subjects: but it is enough, if it be prejudicial to a class of the subjects. Here then is a conspiracy to effect an illegal end, and not only so, but to effect it by illegal means, because to raise the funds by false rumours, is by illegal means. And the end is illegal, for it is to create a temporary rise in the funds without any foundation, the necessary consequence of which must be to prejudice all those who become purchasers during the period of that fluctuation." And by Dampier, J., "I own I cannot raise a doubt, but that this is a complete crime of conspiracy according to any definition of it. The means used are wrong, they were false rumours; the object is wrong, it was to give a false value to a commodity in the public market, which was injurious to those who had to purchase." (y)

In the argument upon the foregoing case, an authority was cited, where the defendants being acquitted of all but conspiring to impoverish the farmers of the excise, it was objected that there was no offence: but the Court held it well, because the information shewed that the excise was parcel of the revenue of the crown, and so the impoverishment of the farmers of excise tended to prejudice the revenue of the crown. (z)

Conspiracy to impoverish the farmers of the excise.

In a late case, it was holden, that a conspiracy to obtain money by procuring from the lords of the treasury the appointment of a person to an office in the customs, is a misdemeanor at common law. The counsel for the defendant proposed to argue, that the indictment was bad on the face of it, as it was not a misdemeanor at common law to sell, or to purchase an office like that of a coast waiter; and that, however reprehensible such a practice might be, it could only be made an indictable offence by act of parliament. But Lord Ellenborough, C. J., said, "If that be a question it must be debated on a motion in arrest of judgment, or on a writ of error. But after reading the case of *Rex v. Vaughan*, (a) it will be very difficult to argue that the offence charged in the indictment is not a misdemeanor." And Grose, J., in passing sentence, likewise observed, that there could be no

Pollman's case. Conspiracy to obtain money by procuring from the lords of the treasury the appointment of a person to an office in the customs.

(y) *Rex v. De Berenger and others*, 3 M. & S. 67.

(a) 4 Burr. 2494. *Ante*, Vol. I. p. 148.

(z) *Rex v. Starling*, 1 Sid. 174.

Conspiracies
to commit
riots.

doubt that the indictment was sufficient, and that the offence charged was clearly a misdemeanor at common law.(b)

Precedents are to be met with in the books of indictments for conspiracies to commit riots.(c) And in a late case, it was said by a learned Judge, with respect to premeditated and systematic tumults at a theatre, that "the audience have certainly a right to express by applause or hisses the sensations which naturally present themselves at the moment; and nobody has ever hindered, or would ever question the exercise of that right. But if any body of men were to go to the theatre with the settled intention of hissing an actor or even of damning a piece, there can be no doubt that such a deliberate and preconcerted scheme would amount to a conspiracy, and that the persons concerned in it might be brought to punishment."(d)

Conspiring to
marry pau-
pers, in order
to charge a
parish.

Several cases have occurred in which the conspiring and contriving, by sinister means, to marry a pauper of one parish to a settled inhabitant of another, in order to bring a charge upon it, have been considered as indictable offences.(e) It is observed respecting a conspiracy of this kind, that, considering the offence as a prostitution of the sacred rites of marriage, for corrupt and mercenary purposes, and that, by artful and sinister means, persons are seduced into a connection for life without any inclination of their own, and contrary to that freedom of choice which is peculiarly required in forming so close an union, and on which the happiness of them both so entirely depends; and this for the sake of some gain or saving to others who bring about such marriage; in this light it seems a fit ground for criminal cognizance, not only as being a great oppression upon the parties themselves more immediately interested, but as an offence against society in general; being an abuse of that institution by which society is best continued and legal descents preserved, and a perversion of the purposes for which it was ordained.(f) But in a case where, upon an indictment against parish-officers for a conspiracy of this kind, it appeared that a man of one parish having gotten a woman with child belonging to another, the defendants had agreed with the man, (who was of the age of 29,) with the approbation of his father, to give him two guineas if he would marry the woman, and that he afterwards married her on such condition, and received the money from the defendants immediately after the marriage; and it was also sworn both by the man and the woman, that they were willing to marry at the time; Buller, J., directed an acquittal, notwithstanding the proof of the money having been given to procure such consent; and this after the putative father had been taken up under a magistrate's warrant, and was in custody of the overseers. And that learned Judge held it necessary, in support of such an indictment, to shew that the defendants had made use of some violence, threat, or contrivance, or

(b) *Rex v. Pollman and others*, 2 Campb. 229.

(c) 2 Chit. Crim. L. 506, note (f).

(d) By Mansfield, C. J., in *Clifford v. Brandon*, 2 Campb. 369.

(e) *Rex v. Tarrant*, 4 Burr. 2106.

Rex v. Herbert and others, 1 East. P. C. c. 11. s. 11. p. 461. *Rex v. Compton and others*, Cald. 246. 8 Mod. 320.

(f) 1 East. P. C. c. 11. s. 11. p. 461.

used some sinister means to procure the marriage without the voluntary consent or inclination of the parties themselves; and that the act of marriage being in itself lawful, a conspiracy to procure it could only amount to a crime by the practice of some undue means.(g)

In a case where the indictment stated the marriage to have been procured by threats and menaces against the peace, &c. it was holden to be sufficient; without averring in terms, that the marriage was against the will or consent of the parties; though that must be proved.(h)

Upon an indictment for conspiring together, and giving the husband money to marry a poor helpless woman, who was an *inhabitant* of B. in order to settle her in the parish of A., where the husband was settled, judgment was arrested, because it was not averred that she was last legally settled in B.(i) But it is observed, that it seems to be perfectly immaterial where the woman's settlement was, if it were not in A.; provided that fact distinctly appeared.(j) It is further said, however, that it is usual to aver the settlements of the parties in their respective parishes; and also that the woman was chargeable to her own parish at the time; though this latter has never been adjudged to be necessary; nor seems to be required according to the general rules which govern the offence of conspiracy.(k) It should seem that in such cases both the purpose and the means used are clearly unlawful.

Conspiring to let a pauper land to the intent that he may gain a settlement, is illegal.(l)

Conspiring to charge a man with being the father of a bastard child, with intent to extort money from him, is indictable; and where the object is stated to be to extort money, it is immaterial whether the woman is or is not pregnant.(m) And conspiring to make such a charge, though without any intent to extort money, is indictable; and it is not necessary to state in the indictment that the charge was false, or that the child was likely to be chargeable. The Court doubted upon the objection that the charge was not stated to be false, but ultimately they held the indictment to be sufficient, as the defendants were at least charged with conspiring to accuse the prosecutor of fornication, and although that was spiritual defamation, conspiring to do it was a temporal offence.(n)

The frauds practised by swindlers may sometimes be indictable as conspiracies. In a case which has been mentioned in a former part of this Work,(o) where the prisoner had been acquitted upon a charge of forgery, he was afterwards indicted with two of his associates for a conspiracy to defraud. The indictment charged that

Conspiracy to charge a man with being the father of a bastard child.

Conspiracies to defraud.

Hevey's case: Conspiring to make a fraudulent acceptance of a bill of exchange.

(g) *Rex v. Fowler and others, cor. Buller, J., Taunton Spr. Ass. 1788.* 1 East. P. C. c. 11. s. 11. p. 461. And the learned Judge said that this point had been so ruled several times by several Judges.

(h) *Rex v. Parkhouse and Tremlet, cor. Buller, J., Exeter Sum. Ass. 1792.* 1 East. P. C. c. 11. s. 11. p. 462.

(i) *Rex v. Edwards and others, 8 Mod. 320.*

(j) 1 East. P. C. c. 11. s. 11. p. 462.

(k) *Id. Ibid.*

(l) *Per cur.* 8 Mod. 820.

(m) *Rex v. Armstrong, 1 Ventr. 301.* 1 Lev. 62. 2 Sid. 68.

(n) *Reg. v. Best, Ld. Raym. 1167.*

(o) *Ante, 323, 324.*

the defendants, John Hevey, Richard Beatty, and Bryan M'Carty, fraudulently and unlawfully conspired that Beatty should write his acceptance to a certain paper-writing, purporting to be a bill of exchange, &c. (the tenor of which was set out,) in order that Hevey might, by such acceptance, and by the name M'Carty being indorsed on the back thereof, negotiate the said paper-writing as a good bill of exchange, truly drawn at Bath, by one Jer. Connell, for Smith and Co. as partners in the business of bankers, under the stile of *Bath Bank*, as persons well known to them the said defendants, and thereby fraudulently to obtain from the king's subjects goods and monies; that Beatty, in pursuance of such conspiracy and agreement, did fraudulently and unlawfully *write his acceptance* to the said paper-writing to the tenor following; *viz.* Accepted, 20 Nov.—81, R. B., well knowing the firm of Smith and Co., to be fictitious; that the defendants procured the indorsement "B. M'Carty," to be written on the same; and that the said Hevey, in pursuance of such fraudulent conspiracy, did utter the said paper-writing to one S. Read, as and for a good bill of exchange, truly drawn, &c. and accepted by the said Beatty as a person able to pay the said sum of 30*l.*, in order to negotiate the same, and by means thereof did fraudulently obtain a gold watch, value twelve guineas, and 7*l.* 8*s.* in money; whereas, in truth, at the time of drawing, accepting, and uttering the said bill, there were no such persons as Smith, and Co. in the business of bankers at Bath, and the said Beatty was not of sufficient ability to pay the said 30*l.*, they, the defendants, well knowing the same, &c.; whereby they defrauded the said S. Read, of the said goods and monies. The facts so charged being fully proved, the defendants were convicted. (*p*)

Roberts's case.
Conspiracy to
defraud trades-
men.

In a case of later occurrence, the defendants were convicted on an indictment which charged them with a conspiracy to cause themselves to be believed persons of large property, for the purpose of defrauding tradesmen. (*q*)

Conspiracy to
barter un-
wholesome
wine.
Macarty and
Forden-
bourgh's case.

The selling unwholesome provisions is, as we have seen, an indictable offence; and the following case of bartering bad and unwholesome wine appears to have been treated as a conspiracy. The indictment charged that the defendants falsely and deceitfully intending to defraud Thomas Chowne, of divers goods, &c. together deceitfully bargained with him to barter, sell, and exchange a certain quantity of pretended wine, as good and true new Portugal wine of him the said Fordenbourgh, for a certain quantity of hats of him the said Chowne; and that, upon such bartering, &c. the said Fordenbourgh pretended to be a merchant of London, and to trade as such in Portugal wines, when in fact he was no such merchant, nor traded as such in wines; and the said Macarty, on such bartering, &c. pretended to be a broker of London, when in fact he was not, and that the said Chowne, giving credit to the said fictitious assumptions, personating, and deceits, did barter, sell, and exchange, to Fordenbourgh, and did deliver to Macarty, as

(*p*) *Rex v. Hevey, Beatty, and M'Carty*, 1782. 2 East. P. C. c. 19. s. 6. p. 858. note (*a*).

(*q*) *Rex v. Roberts and others*, 1808. cor. Ld. Ellenborough, C. J., 1 Campb. 399.

the broker between the said Chowne and Fordenborough, for the use of Fordenborough, a certain quantity of hats, of a certain value, for so many hogsheads of the pretended new Portugal wine; and that Macarty and Fordenborough, on such bartering, &c. affirmed that it was true new Lisbon wine of Portugal, and was the wine of Fordenborough, when in fact it was not Portugal wine, nor was it drinkable or wholesome, nor did it belong to Fordenborough, to the great deceit and damage of the said Chowne, and against the peace, &c. (r) It is observed of this indictment, which was for a cheat at common law, that though it did not charge that the defendants conspired, eo nomine; yet it charged that they together, &c. did the acts imputed to them, which might be considered to be tantamount. (s) The case was considered as one of doubt and difficulty; but it seems that judgment was ultimately given for the crown, on the ground that the offence was conspiracy. (t)

We have seen that all confederacies, wrongfully to prejudice a third person, are considered as highly criminal at common law. (u) And where a woman, living in the service of her master, conspired with another man that he should personate her master, and in that character should solemnize a marriage with her, which was accordingly done, for the purpose of afterwards raising a specious title to the property of the master; the gist of the indictment was for the conspiracy, and the conviction was founded on that ground. And it was considered in this case that, though no actual injury was proved, yet it was the province of the jury to collect, from all the circumstances of the case, whether there was not an intention to do a future injury to the person whose name was assumed. (x)

Conspiracy to solemnize a marriage.

The seduction of a young woman may be attended with such circumstances as to be indictable as a conspiracy. A case is reported where Lord Grey and others were charged, by an information at common law, with conspiring and intending the ruin of the Lady Henrietta Berkeley, then a virgin unmarried, within the age of eighteen years, one of the daughters of the Earl of Berkeley, (she being under the custody, &c. of her father,) and soliciting her to desert her father, and to commit whoredom and adultery with Lord Grey, who was the husband of another daughter of the Earl of Berkeley, sister of the Lady Henrietta, and to live and cohabit with him: and further, the defendants were charged, that in prosecution of such conspiracy, they took away the Lady Henrietta at night, from her father's house and custody, and against his will, and caused her to live and cohabit in divers secret places with Lord Grey; to the ruin of the lady, and to the evil example, &c. The defendants were found guilty; though there was no proof of any force, but on the contrary it appeared that the lady, who was herself examined as a witness, was desirous of leaving her father's house, and concurred in all the measures taken for her departure and subsequent concealment. It was not shewn

Conspiracy to seduce a young woman.

(r) *Reg. v. Macarty and Fordenborough*, 2 *Ld. Raym.* 1179. 2 *East. P. C. c.* 18. s. 5. p. 823.

(s) 2 *East. P. C. c.* 18. s. 5. p. 824.

(t) 2 *East. ibid.* And see *ante*, 291.

(u) *Ante*, 553.

(x) *Rex v. Taylor and Robinson*, 1 *Leach* 37. 2 *East. P. C. c.* 20. s. 5. p. 1010.

that any artifice was used to prevail on her to leave her father's house: but the case was put upon the ground that there was a solicitation and enticement of her to unlawful lust by Lord Grey, who was the principal person concerned, the others being his servants, or persons acting by his command, and under his controul.(y)

Conspiracy to impoverish a man in his trade.

A case is reported where several persons were convicted on an indictment which charged them with conspiring to impoverish one H. B., a tailor, and to prevent him, by indirect means, from carrying on his trade.(z) This, however, appears to have been considered as a conspiracy in restraint of trade, and so far a conspiracy to do an unlawful act affecting the public.(a)

But an indictment will not lie for conspiring to commit a civil trespass.
Turner's case.

In a late case it was holden, that an indictment will not lie for conspiring to commit a civil trespass upon property, by agreeing to go, and by going into, a preserve for hares, the property of another, for the purpose of snaring them; though it be alleged to be done in the night time, and that the defendants were armed with offensive weapons, for the purpose of opposing resistance to any endeavours to apprehend or obstruct them. And Lord Ellenborough, C. J., in pronouncing the judgment of the Court, said, "I should be sorry that the cases in conspiracy against individuals, which have gone far enough, should be pushed still farther. I should be sorry to have it doubted whether persons agreeing to go and sport upon another's ground, in other words, to commit a civil trespass, should be thereby in peril of an indictment for an offence which would subject them to infamous punishment."(b) It may be observed that it was not stated in the indictment that the weapons were *dangerous*, nor that the defendants conspired to go, &c. *with strong hand*.

Nor will an indictment lie for a conspiracy to cheat and defraud a man by selling him an unsound horse.
Pywell's case.

In a later case the defendants were charged by the indictment with conspiring to cheat and defraud General Maclean, by selling him an unsound horse. It appeared that one of the defendants, named Pywell, had advertised the sale of horses, undertaking to warrant their soundness; and that, upon an application by General Maclean, at Pywell's stables, another of the defendants stated to him that he had lived with the owner of a horse which he then shewed to the general; that he knew the horse to be perfectly sound, and, as the agent of Pywell, would warrant him to be sound. General Maclean purchased the horse, taking a receipt, in which the horse was mentioned as warranted sound, and to be returned if not approved of within a week. It was discovered very soon after the sale, that the animal was nearly worthless. Upon these facts Lord Ellenborough, C. J., was of opinion, that the case did not assume the shape of a conspiracy, and that the evidence would not warrant any proceeding beyond that of an

(y) *Rex v. Lord Grey and Others*, 3 St. Tri. 519. 1 East. P. C. c. 11. s. 10. p. 460. See also *Rex v. Sir Francis Blake Delaval and Others*, 3 Burr. 1434.

(z) *Eccles's case*, 1 Leach 274.

(a) By Lord Ellenborough, C. J., in *Rex v. Turner*, 13 East. 228.

(b) *Rex v. Turner*, 13 East. 228,

231. But *qu.* as to that which is reported in this case, (p. 230.) to have been said by Lord Ellenborough, in the course of the argument, *viz.* that "all the cases in conspiracy proceed upon the ground that the object of the combination is to be effected by some falsity."

action on the warranty, for the breach of a civil contract. And his Lordship said that, if this were to be considered as an indictable offence, then, instead of the actions which had been brought on warranties, the defendants ought to have been indicted as cheats: and that no indictment, in a case like this, could be maintained, without evidence of concert between the parties to effectuate a fraud. The defendants were accordingly acquitted. (c)

It was ruled that an indictment could not be supported for a conspiracy to deprive a man of the office of secretary to an illegal unincorporated trading company. Lord Ellenborough, C. J., said that, the society being certainly illegal, to deprive an individual of an office in it could not be treated as an injury: and that when the prosecutor was secretary to the society, instead of having an interest which the law would protect, he was guilty of a crime. (d)

The several statutes relating to the combinations of workmen were repealed by the 5 Geo. 4. c. 95. But the statute 6 Geo. 4. c. 129. recites that the provisions of the former act had not been found effectual, and that such combinations are injurious to trade and commerce, dangerous to the tranquillity of the country, and especially prejudicial to the interests of all who are concerned in them, and that it was expedient to make further provision, as well for the security and personal freedom of individual workmen in the disposal of their skill and labour, as for the security of the property and persons of masters and employers, and for that purpose to repeal the said act, and to enact other provisions and regulations in lieu thereof; and then repeals the said act of 5 Geo. 4. c. 95. It then provides that various statutes therein mentioned, and all enactments in any other statutes or acts which, immediately before the passing of the said recited act of the 5 Geo. 4. were in force throughout, or in any part of the United Kingdom of Great Britain and Ireland, relative to combinations to obtain an advance of wages, or to lessen or alter the hours or duration of the time of working, or to decrease the quantity of work, or to regulate or controul the mode of carrying on any manufacture, trade, or business, or the management thereof, or relative to combinations to lower the rate of wages, or to increase or alter the hours or duration of the time of working, or to increase the quantity of work, or to regulate or controul the mode of carrying on any manufacture, trade, or business, or the management thereof, or relative to fixing the amount of the wages of labour, or relative to the obliging workmen not hired to enter into work, and every enactment enforcing or extending the application of any of the said several enactments so repealed, shall notwithstanding the repeal of the said recited act of the 5 Geo. 4. still be and remain repealed, except only so far as the same or any of them may have repealed any former act or enactment.

The third section enacts, "that from and after the passing of this act, if any person shall, by violence to the person or property, or by threats or intimidation, or by molesting or in any way obstructing another, force, or endeavour to force any journeyman,

An indictment will not lie for conspiring to deprive a man of the office of secretary to an illegal trading company.

Combinations amongst journeymen, workmen, &c. 6 G. 4. c. 129. repeals former acts.

6 Geo. 4. c. 129. s. 3. Compelling journeymen to leave employ-

(c) *Rex v. Pywell and Others*, 1 Lord Ellenborough, C. J., 1 Campb. Stark. R. 402. 549. in the notes.

(d) *Rex v. Stratton and Others*, *cor.*

ment, or to return work unfinished, preventing hiring themselves, compelling them to belong to clubs, &c. or to pay fines, or to alter the mode of carrying on business, punishable by imprisonment, &c.

“ manufacturer, workman, or other person hired or employed in
 “ any manufacture, trade, or business, to depart from his hiring,
 “ employment, or work, or to return his work before the same
 “ shall be finished, or prevent or endeavour to prevent any jour-
 “ neyman, manufacturer, workman, or other person not being
 “ hired or employed, from hiring himself to, or from accepting
 “ work or employment from any person or persons; or if any
 “ person shall use or employ violence to the person or property of
 “ another, or threats or intimidation, or shall molest or in any way
 “ obstruct another for the purpose of forcing or inducing such
 “ person to belong to any club or association, or to contribute to
 “ any common fund, or to pay any fine or penalty, or on account
 “ of his not belonging to any particular club or association, or not
 “ having contributed or having refused to contribute to any com-
 “ mon fund, or to pay any fine or penalty, or on account of his
 “ not having complied or of his refusing to comply with any rules,
 “ orders, resolutions, or regulations made to obtain an advance or
 “ to reduce the rate of wages, or to lessen or alter the hours of
 “ working, or to decrease or alter the quantity of work, or to re-
 “ gulate the mode of carrying on any manufacture, trade, or busi-
 “ ness, or the management thereof; or if any person shall, by
 “ violence to the person or property of another, or by threats or
 “ intimidation, or by molesting or in any way obstructing another,
 “ force or endeavour to force any manufacturer or person carrying
 “ on any trade or business, to make any alteration in his mode of
 “ regulating, managing, conducting, or carrying on such manu-
 “ facture, trade, or business, or to limit the number of his appren-
 “ tices, or the number or description of his journeymen, workmen,
 “ or servants; every person so offending, or aiding, abetting or
 “ assisting therein, being convicted thereof in manner hereinafter
 “ mentioned, shall be imprisoned only, or shall and may be impris-
 “ oned and kept to hard labour, for any time not exceeding three
 “ calendar months.”

S. 4. Proviso for meetings for settling rates of wages to be received, or hours of work to be employed by the persons meeting.

The fourth section enacts, “ that this act shall not extend to
 “ subject any persons to punishment who shall meet together for
 “ the sole purpose of consulting upon and determining the rate of
 “ wages or prices, which the persons present at such meeting, or
 “ any of them, shall require or demand for his or their work, or
 “ the hours or time for which he or they shall work in any manu-
 “ facture, trade, or business, or who shall enter into any agree-
 “ ment, verbal or written, among themselves, for the purpose of
 “ fixing the rate of wages or prices which the parties entering into
 “ such agreement, or any of them, shall require or demand for his
 “ or their work, or the hours of time for which he or they will
 “ work, in any manufacture, trade, or business; and that persons
 “ so meeting for the purposes aforesaid, or entering into such
 “ agreement as aforesaid, shall not be liable to any prosecution or
 “ penalty for so doing, any law or statute to the contrary notwith-
 “ standing.”

S. 5. Proviso for meetings for rates of wages, &c. to be paid by

The fifth section provides and enacts, that this act shall not
 “ extend to subject any persons to punishment who shall meet to-
 “ gether for the sole purpose of consulting upon and determining
 “ the rate of wages or prices which the persons present at such

"meeting, or any of them, shall pay to his or their journeymen, workmen, or servants, for their work, or the hours of time of working in any manufacture, trade, or business, or who shall enter into any agreement, verbal or written, among themselves, for the purpose of fixing the rate of wages or prices, which the parties entering into such agreement, or any of them, shall pay to his or their journeymen, workmen, or servants, for their work, or the hours or time of working, in any manufacture, trade, or business; and that persons so meeting for the purposes aforesaid, or entering into any such agreement as aforesaid, shall not be liable to any prosecution or penalty for so doing, any law or statute to the contrary notwithstanding."

masters to
journeymen,
&c.

This act further provides that offenders shall be compelled to give evidence, and shall be indemnified: and it also contains provisions for the summoning offenders before justices of peace, and for issuing warrants for their apprehension when they do not appear upon summons; regulates the proceedings before the justices; gives a form of conviction, and an appeal to the quarter sessions.(e)

We have seen that from the nature of conspiracy it is an offence which cannot be charged as having been committed by one person only.(f) And upon this ground it has been holden that no prosecution for a conspiracy can be maintained against a husband and wife only because they are esteemed but one person in law, and presumed to have but one will.(g) So if all the defendants, who are prosecuted for a conspiracy, be acquitted, but one, and the conspiracy be not stated as having been had with persons unknown, the acquittal of the rest is the acquittal of that one also.(h) But if two persons be indicted for a conspiracy, and one only of them appear and take his trial, he may be found guilty, though the other defendant be absent, and has not pleaded:(i) and this, although the other conspirator named in the indictment was dead before the indictment was preferred.(k)

Of the prosecution and proceedings in conspiracy. More than one person must have conspired.

With respect to the statement of the charge in the indictment it may be observed, that though it is usual to state the conspiracy, and then shew that in pursuance of it certain overt acts were done, it is sufficient to state the conspiring alone.(l) And it is not necessary to state the means by which the object was to be effected, as the conspiracy may be complete before the means to be used are taken into consideration. Therefore an indictment for conspiring by divers false pretences and subtle means and devices to get money from J. S., and cheat him thereof, is not objectionable on the ground that it is too general, or does not sufficiently shew the *corpus delicti*, or specify any overt act.(m) It need not be averred in the indictment that the prosecutor was in-

Statements in the indictment.

(e) S. 6. *et sequ.* And see Burn's Justice, tit. *Servants*.

(f) *Ante*, 553.

(g) 1 Hawk. P. C. c. 72. s. 8.

(h) *Id. Ibid.* 3 Chit. Crim. L. 1141.

(i) *Rex v. Kinnersley and Moore*, 1 Str. 193.

(k) *Rex v. Nicholls and Bygrove*,

2 Str. 1227. But see the case as better reported in 13 East. 412. in the notes.

(l) *Reg. v. Best*, 2 Ld. Raym. 1167. 1 Salk. 174. 3 Chit. Crim. L. 1143.

(m) *Rex v. Gill*, 2 B. & A. 204.

nocent of the crime imputed to him by the conspirators.(n) And in a case of a conspiracy to charge a person with being the father of a bastard child, it was holden not to be necessary to aver that the prosecutor was not the father; especially when the words of the indictment were "did *falsely* conspire *falsely* to charge, &c.;" the principle being that innocence must be intended till the contrary appears.(o) And it should seem that even without those words the indictment would be sufficient, and need not state that the charge was false, nor that the child was likely to become chargeable, &c.(z) And an indictment for a conspiracy was holden to be good, although it was not alleged *in the charge itself* that the defendants conspired *falsely* to indict the prosecutor, and although it did not appear of what *particular crime or offence* they conspired to indict him, but only in *general* that the defendants did wickedly and maliciously conspire to indict and prosecute the prosecutor for a crime or offence liable to be capitally punished by the laws of this kingdom.(p) The conspiracy is the gist of the charge alleged in such an indictment.

Not necessary to state that the defendants knew, &c.

In a case where the defendants were indicted for conspiring to pervert the course of justice by producing in evidence a false certificate of a Justice of peace, it was holden not to be necessary to set forth in the indictment that the defendants knew, at the time of the conspiracy, that the contents of the certificate were false; on the ground that if persons, with intent to obstruct the course of justice, conspire to state a fact at all events as true, which they do not know to be true, it is criminal; and that the defendants were bound to have known that the fact was true which they agreed to certify as such.(q)

Not necessary to state the means by which the conspiracy was effected.

Where the act is in itself illegal, it is not necessary to state the means by which the conspiracy was effected. Thus, where the indictment charged that the defendants conspired together by indirect means to prevent one H. B. from exercising the trade of a tailor, and it was contended that it should have stated the fact on which the conspiracy was founded, the means used for the purpose, Lord Mansfield, C. J., said "The conspiracy is 'stated and its object; it is not necessary that any means should 'be stated:'" and Buller, J., said, "If there be any objection, 'it is that the indictment states too much; it would have been 'good certainly if it had not added 'by indirect means,' and 'that will not make it bad.'"(r) And in a late case, where the indictment charged that the defendants conspired, by divers false pretences and subtle means and devices, to obtain from A. divers large sums of money, and to cheat and defraud him thereof; it was holden that, the gist of the offence being the conspiracy, it

(n) *Rex v. Kinnersley and Moore*, 1 Str. 193.

(o) *Reg. v. Best and another*, 1 Salk. 174. 2 Lord Raym. 1167.

(z) 2 Ld. Raym. 1167.

(p) *Rex v. Spragg and another*, 2 Burr. 993.

(q) *Rex v. Mawbey and others*, 6 T. R. 619. *Ante*, 556., Lawrence, J., said

that it was not unlike the case of perjury, where a man swears to a particular fact without knowing at the time whether the fact be true or false; which is as much perjury as if he knew the fact to be false, and equally indictable. *Ante*, 518.

(r) *Eccles's case* in note (d) to *Rex v. Turner*, 13 East, 230. *Ante*, 564.

was quite sufficient only to state that fact and its object, and not necessary to set out the specific pretences. Bayley, J., said, that when parties had once agreed to cheat a particular person of his monies, although they might not then have fixed on any means for that purpose, the offence of conspiracy was complete. (s) But where the act only becomes illegal from the means used to effect it, the illegality of it should be explained by proper statements; as in the cases which have been cited of conspiracies to marry paupers. (t)

The technical averment of the agreement and conspiracy, generally used in the indictment, charges that the defendants "did conspire, combine, confederate, and agree together:" but it is said that other words of the same import seem to be equally proper. (u) To the counts for a conspiracy may be joined such other counts as the circumstances of the case may seem to require (not charging a felony) though they do not include a charge of conspiracy. (x)

Technical
averment of
conspiracy.

It has been holden that in an indictment for a conspiracy the venue must be laid where the conspiracy was, and not where the result of such conspiracy was put in execution. (y) But in a late case it was said by the Court, that there seemed to be no reason why the crime of conspiracy, amounting only to a misdemeanor, might not be tried, wherever one distinct overt act of conspiracy was in fact committed, as well as the crime of high treason, in compassing and imagining the King's death, or in conspiring to levy war. (z) And a case was cited in which the trial proceeded upon this principle; and in which, though no proof of actual conspiracy, embracing all the several conspirators, was attempted to be given in Middlesex, where the trial took place, and though the individual actings of some of the conspirators were wholly confined to other counties than Middlesex; yet the conspiracy as against all having been proved, from the community of criminal purpose, and by their joint co-operation in forwarding the objects of it, in different places and counties, the locality required for the purpose of trial was holden to be satisfied by overt acts, done by some of them, in prosecution of the conspiracy in the county where the trial was had. (a)

Place where
the offence
may be tried.

The offence of conspiracy may be tried by Justices of peace in their quarter-sessions. In a case where the question of their jurisdiction was raised, no authority being cited either on the one side or on the other, the Court decided in favour of their jurisdiction, upon general principles; saying, that a conspiracy was a trespass, and that trespasses were indictable at sessions, though not committed with force and arms. (b)

Jurisdiction of
the Justices at
quarter-sessions.

(s) *Rex v. Gill*, 2 Barnw. & Ald. 204.

(t) *Ante*, 560, 561.

(u) 3 Chit. Crim. L. 1143.

(x) See the judgment of Lord Ellenborough, C. J., in *Rex v. Johnson*, 3 M. & S. 550.

(y) *Reg. v. Best and another*, 1 Salk. 174.

(z) *Rex v. Brisac and Scott*, 4 East. 171.

(a) *Rex v. Bowes*, K. B. Trin. T. 1787, cited by Grose, J., in pronouncing the opinion of the Court in *Rex v. Brisac and Scott*, *ante*, note (z).

(b) *Rex v. Rispal*, 3 Burr. 1320. 1 Black. R. 368. 1 Burn. Just. Con-

Wife of one defendant no witness for the others.

Evidence. How far the acts or words of one conspirator evidence against the others.

On a prosecution against several persons for a conspiracy, the wife of one of the defendants has been holden not to be a competent witness for the others; a joint offence being charged, and an acquittal of all the other defendants being a ground of discharge for the husband. (c)

An able writer upon the law of evidence lays down the following doctrine with respect to the acts or words of one conspirator being evidence against the others. Where several persons are proved to have combined together for the same illegal purpose, any act done by one of the party, in pursuance of the original concerted plan, and with reference to the common object, is in the contemplation of law the act of the whole party; and, therefore, the proof of such act, would be evidence against any of the others, who were engaged in the same conspiracy; and further, any declarations, made by one of the party at the time of doing such illegal act, seem not only to be evidence against himself, as tending to determine the quality of the act, but to be evidence also against the rest of the party, who are as much responsible as if they had themselves done the act. But what one of the party may have been heard to say at some other time, as to the share which some of the others had in the execution of the common design, or as to the object of the conspiracy, cannot, it is conceived, be admitted as evidence to affect them on their trial, for the same offence. (d) And, in general, proof of concert and connection must be given, before evidence is admissible of the acts or declarations of any person not in the presence of the prisoner. (e) It is for the Court to judge whether such connection has been sufficiently established; but when that has been done, the doctrine applies that each party is an agent for the others, and that an act done by one in furtherance of the unlawful design, is in law the act of all, and that a declaration made by one of the parties, at the time of doing such an act, is evidence against the others. Thus where Stone was indicted for treason, and one of the overt acts charged was conspiring with Jackson and others to collect intelligence, and to communicate it to the King's enemies in France, &c. after evidence had been given to connect the prisoner with Jackson in the conspiracy as charged, the secretary of state for the foreign department was called to prove, that a letter of Jackson's, containing treasonable information, had been transmitted to him from abroad, but in a confidential way, which made it impossible for him to divulge by whom it was communicated; and such letter was received in evidence. (f) So, in another case, after evidence had been given of a treasonable conspiracy, in which the prisoner was concerned, it was held that papers found in the lodging of a co-conspirator, at a period subsequent to the apprehension of the prisoner, might be read in evidence, upon strong presumptive proof being given that the lodgings had not been entered by any one in the

spiracy, Sect. 1. The point was so decided in an earlier case, *Rex v. Edwards and others*, 8 Mod. 321.

(c) *Rex v. Lockyer and Others*, *cor.* Lord Ellenborough, C. J., 5 Esp. N. P. R. 107. *Rex v. Frederick and*

Another, 2 Str. 1094.

(d) Phill. on Evid. 76, 77.

(e) 1 East. P. C. c. 2. s. 37. 2 Stark. Evid. 401.

(f) *Rex v. Stone*, 6 T. R. 527.

interval between the apprehension of the prisoner and the finding of the papers, and although no absolute proof had been given of their existence previous to the prisoner's apprehension. *(g)* But it seems that if such papers had not been proved to have been intimately and immediately connected with the objects of the conspiracy, they would not have been admissible: as, in the same case, a paper containing seditious questions and answers, and found in the possession of a co-conspirator, was not read in evidence, the Court doubting whether it was sufficiently connected by evidence with the object of the conspiracy to render it admissible. *(h)*

The evidence in support of an indictment for a conspiracy is generally circumstantial: and it is not necessary to prove any direct concert, or even any meeting of the conspirators; as the actual fact of conspiracy may be collected from the collateral circumstances of the case. *(i)* In a case where a husband, wife, and their servants, were indicted for a conspiracy to ruin the trade of the prosecutor, who was the King's card-maker, the evidence against them was, that they had at several times given money to the prosecutor's apprentices, to put grease into the paste; which had spoiled the cards; but there was no account given that ever more than one at a time was present, though it was proved they had all given money in their turns: it was objected that this could not be a conspiracy; on the ground that several persons might do the same thing, without having any previous communication with each other. But it was ruled that the defendants being all of a family, and concerned in making of cards, it would amount to evidence of a conspiracy. *(k)* And it appears also to have been considered that if a banker permits a sum of money to be lodged at his house, to be paid over, for corruptly procuring an appointment under government, he may be indicted for a conspiracy along with those who are to procure the appointment, and receive the money. *(l)* Every person concerned in any of the criminal parts of the transaction alleged as a conspiracy may be found guilty; though there be no evidence that such persons joined in concerting the plan; or that they ever met the others, and though it is probable they never did; and though some of them only join in the latter parts of the transaction, and probably did not know of the matter until some of the prior parts of the transaction were complete. *(m)* So that if several persons meet from different motives, and then join in effecting one common and illegal object, it is a conspiracy. *(n)*

It appears to have been held that upon an indictment for a conspiracy, where from the nature of the case it would be difficult to prove the privity of the parties accused, without first proving the existence of a conspiracy, the prosecutor may go into general

*Evidence.
Proof of the
conspiracy.*

*General evi-
dence of the
nature of the
conspiracy.*

(g) *Rex v. Watson*, 2 Stark. C. 140.

(h) *Id. Ibid.* But they held that if proof were to be given that the instrument was to be used for the purposes of the conspiracy it would clearly be admissible.

(i) *Rex v. Parsons and Another*, 1 Black. R. 392.

(k) *Rex v. Cope and Others*, 1 Str. 144.

(l) *Rex v. Pollman and Others*, 2 Campb. 233.

(m) *Rex v. Lord Grey and Others*, 9 St. Tri. 127.

(n) *Rex v. Lec*, 2 Stark. Evid. 401.

evidence of its nature, before it is brought home to the defendants. The indictment charged the defendants, who were journeymen shoe-makers, with a conspiracy to raise their wages; and evidence was offered on the part of the prosecution of a plan for a combination amongst the journeymen shoe-makers, formed and printed several years before, regulating their meetings, subscriptions, and other matters for their mutual government in forwarding their designs. This evidence was objected to by the counsel for the defendants; but Lord Kenyon, C. J., said, that if a general conspiracy existed, general evidence might be given of its nature, and the conduct of its members, so as to implicate men who stood charged with acting upon the terms of it years after those terms had been established, and who might reside at a great distance from the place where the general plan was carried on: and his lordship, therefore, permitted a person who was a member of this society, to prove the printed regulations and rules of the society, and that he and others acted under them, in execution of the conspiracy charged upon the defendants, as evidence introductory to the proof that they were members of such society, and equally concerned; but he observed, that it would not be evidence to affect the defendants until they were made parties to the same conspiracy. (o) And in several important cases, evidence has been first given of a general conspiracy before any proof of the particular part which the accused parties have taken. (p) But after such general evidence has been received the parties before the court must be affected for their share of it. And it seems that mere detached declarations and confessions of persons not defendants not made in the prosecution of the object of the conspiracy, are not evidence to prove its existence; although consultations for the purpose, and letters written in prosecution of the design, but not sent, are admissible. (q) It results from the principles already stated, and it has been observed as a conclusion to which they lead, that it seems to make no difference as to the admissibility of the act or declaration of a conspirator against the party defendant before the court, whether such co-conspirator be indicted or not, or tried or not with the defendant. (r) The evidence is admitted on the ground that the act or declaration of one is the act or declaration of both when united in one common design.

Cumulative instances of fraud permitted to be given in evidence.

In a case where the indictment charged the defendants with conspiring to cause themselves to be believed persons of large property for the purpose of defrauding tradesmen, evidence was given of their having hired a house in a fashionable street, and represented themselves to one tradesman employed to furnish it as people of large fortune; and then a witness was called to prove that at a different time they had made a similar representation to ano-

(o) *Rex v. Hammond and Webb*, 2 Esp. N. P. R. 718. Lord Kenyon referred to the cases of the state trials in the year 1745, where from the nature of the charge it was necessary to go into evidence of what was going on at Manchester and in France, Scotland, and Ireland, at the same time.

(p) *Lord Stafford's case*, 7 St. Tr. 1218. *Lord W. Russell's case*, 9 St. Tr. 578. *Lord Lovat's case*, 18 St. Tr. 530. *Hardy's case*, 24 St. Tr. 199. *Horne Tooke's case*, 25 St. Tr. 1.

(q) 2 Stark. Evid. 407.

(r) 2 Stark. Evid. 411.

ther tradesman. The evidence of this witness was objected to on the ground that it was not competent to the prosecutor to prove various acts of this kind, and that he was bound to select and confine himself to one. But Lord Ellenborough, C. J., said, "This is an indictment for a conspiracy to carry on the business of common cheats; and cumulative instances are necessary to prove the offence."^(s)

In the case mentioned in this Chapter, of a conspiracy to raise the price of the public funds by false rumours, it was holden that the court will take judicial notice that a war exists between this country and a foreign state, such war having been recognized in different acts of parliament; and, therefore, that an allegation to that effect need not be proved.^(t)

The court will take judicial notice of a war.

Where an indictment against A., B., C., and D., charged that they conspired together to obtain, "*viz.* to the use of them the said A., B., and C., and certain other persons, to the jurors unknown," a sum of money for procuring an appointment under government; and it appeared that D. (although the money was lodged in his hands, to be paid to A. and B. when the appointment was procured,) did not know that C. was to have any part of it, or was at all implicated in the transaction; it was holden, that the averment concerning the application of the money was material, though coming under a *viz.*; and that as to D. the conspiracy was not proved as laid.^(u)

Averment as to one of the conspirators not proved.

In a recent case, a point arose as to the extent to which the counsel for the prosecution in a case of conspiracy might cross-examine a witness, called by only one of several defendants. The indictment was against A., B., and C.; and after the case for the prosecution was closed, C. *only* called a witness, whom he examined as to a conversation between himself and A.; and it was ruled, that the counsel for the prosecution might cross-examine such witness, as to any other conversation between A., and C. although the evidence should tend chiefly to criminate A.^(x)

Point respecting cross-examination where one defendant only calls witnesses.

In former times, persons convicted of a conspiracy at the suit of the king, to accuse another person of a capital offence, were liable to receive what was called the *villanous* judgment, that is, to lose their *liberam legem*, whereby they are discredited and disabled as jurors, or witnesses; to forfeit their goods and chattels, and lands for life; to have those lands wasted, their houses rased, their trees rooted up, and their bodies committed to prison.^(y) But this judgment was not inflicted upon those who were convicted only of conspiracies of a less aggravated kind, at the suit of the party: and for some time past it appears to have been the better opinion, that the villanous judgment is by long disuse become obsolete, not having been pronounced for some ages; and that the punishment for conspiracies in general is, as in the case

Punishment.

(s) *Rex v. Roberts and Others*, 1 Campb. 399. *Ante*, 562.

(t) *Rex v. De Berenger*, 3 M. & S. 67. *Ante*, 553, 559.

(u) *Rex v. Pollman and Others*, 2 Campb. 231.

(x) *Rex v. Kroehl and Others*, 2

Stark. N. P. R. 343. In Stark. on Evid. the learned author subjoins a *qu.* whether in such case counsel would be entitled to address the jury in reply.

(y) 1 Hawk. P. C. c. 72. s. 9. 4 Black. Com. 136.

of other misdemeanors, by fine, imprisonment, and sureties for the good behaviour at the discretion of the court. (z)

Incompetency
as a witness.

A consequence of the attain of conspiracy, where the party was subject to the villanous judgment, appears to have been incompetency as a witness. (a) But this consequence seems not to have attached to other cases of conspiracy at the suit of the party. (b) And in a late case in the Admiralty Court, which underwent much discussion, Sir W. Scott determined on great consideration that a conviction for a conspiracy to commit a fraud would not render an affidavit of the convict inadmissible. (c)

All the defend-
ants must be
present in
Court upon a
motion in ar-
rest of judg-
ment, or for a
new trial.

In conclusion of this chapter, it may be mentioned, that, after a conviction for a conspiracy, the defendants must be present in Court when a motion is made on their behalf, in arrest of judgment. (d) And also that upon a motion for a new trial, after such conviction, all the defendants must be present. (e) But where an indictment has been removed into the Court of King's Bench, after verdict, but before judgment, and set down for argument, it does not appear to be necessary, that the defendants should appear in Court upon the argument, the proceeding being in the nature of a special verdict, and the party not being considered as convicted until after the Court have determined upon the verdict. (f)

(z) *Id. ibid.* The pillory was also very commonly a part of the punishment until taken away by the 56 Geo. 3. c. 138. See *ante*, 550, note (m) In a case where the defendants were convicted on an information for a conspiracy to take away the character of one Kempe, and accuse him of murder, by pretended conversations and communications with a ghost that answered by knocking and scratching in Cock-lane, &c. they received the following judgment:—Richard Parsons, (the father of the child, who was the principal agent in the pretended communication,) to stand thrice in the pillory, and be imprisoned two years; Eliz. Parsons the mother, to be imprisoned one year; Mary Fraser, a servant who was aiding and assisting, was sent to the house of correction, to hard labour for six months; Moore

the curate of the parish, and one James were discharged on paying the prosecutor 300*l.* and his costs, which were nearly as much more. Brown who had published a narrative, and one Day the printer of a newspaper, had previously made their peace with the prosecutor.

(a) Co. Lit. 66. 2 Hale 277. 1 Hawk. P. C. c. 72. s. 9.

(b) 2 Hale 277. Carth. 416. 1 Hawk. P. C. c. 72. s. 9.

(c) In the case of the *Ville de Varsovie* and others, 1817. Phill. on Ev. 24.

(d) *Rex v. Spragg* and another, 2 Burr. 929. 1 Black. R. 209.

(e) *Rex v. Teal* and another, 11 East. 307. *Rex v. Askew*, 3 M. & S. 9. *Rex v. Lord Cochrane*, 3 M. & S. 10.

(f) *Rex v. Nichols*, 2 Str. 1227.

CHAPTER THE THIRD.

OF THREATS, AND THREATENING LETTERS.

It is said, that the dispersing of *bills of menace* threatening destruction to the lives or properties of those to whom they were addressed, for the purpose of extorting money, is, at common law, a high misdemeanor, punishable by fine and imprisonment. (a) Threats directed against persons immediately under the protection of a court are offences punishable by fine and imprisonment; as if a man threaten his adversary for suing him, a counsellor or attorney for being employed against him, a juror for his verdict, or a gaoler or other ministerial officer for keeping him in his custody, and properly executing his duty. (b) And a precedent is given of an indictment at common law against the attorney of a plaintiff in a cause for writing a letter to the attorney of the defendant, who had obtained a verdict on the evidence of his son, threatening to indict the son for perjury unless the defendant gave up the benefit of the verdict. (c)

Threats at
common law.

But it was holden in a modern case, that threatening by letter or otherwise to put in motion a prosecution by a public officer to recover penalties for selling *Friar's Balsam*, without a stamp, (which by the statute 42 Geo. 3. c. 56. is prohibited to be vended without a stamped label), for the purpose of obtaining money to stay the prosecution, was not such a threat as a firm and prudent man might not be expected to resist; and, therefore, was not in itself an indictable offence *at common law*; although it was alleged that the money was obtained; no reference being made to any *statute* which prohibits such attempt. In this case, Lord Ellenborough, C. J., said, "To obtain money under a threat of any kind, or to attempt to do it, is no doubt an immoral action; but "to make it indictable, the threat must be of such a nature as is "calculated to overcome a firm and prudent man. Now the threat "used by the defendant at its utmost extent was no more than "that he would charge the party with certain penalties for selling "medicines without a stamp. That is not such a threat as a firm

Rex v. Southerton.
Threatening to charge a party with penalties for selling medicines without a stamp holden not to be indictable.

But where the threat is calculated to overcome a firm and prudent man, it is indictable.

(a) 1 Hawk. P. C. c. 53. s. 1. Reference is made to 1 Hale 567,—but *q.v.* the reference.

(b) 4 Black. Com. 126.

(c) 2 Chit. Crim. L. 149.

"and prudent man might not, and ought not, to have resisted. "Then what authority is there for considering these as offences at common law? The principal case relied on, is that of *Reg. v. Woodward and others*, which was where the defendants, having another man in their actual custody at the time, threatened to carry him to gaol, upon a charge of perjury; and obtained money from him under that threat, in order to permit his release. (d) "Was not that an actual duress, such as would have avoided a bond given under the same circumstances? But that is very unlike the present case, which is that of a mere threat to put process in a penal action in force against the party. The law distinguishes between threats of actual violence against the person, or such other threats as a man of common firmness cannot stand against, and other sorts of threats. Money obtained in the former cases, under the influence of such threats, may amount to robbery; but not so in cases of threats of other kinds. But this is a case of threatening, and not of deceit: and it must be a threat of such a kind as will sustain an indictment at common law, either according to one case, attended with duress, or, according to others, such as may overcome the ordinary free will of a firm man, and induce him from fear to part with his money. The present case is nothing like any of those; it is a mere threat to bring an action, which a man of ordinary firmness might have resisted." (e)

It appears that, according to the principles laid down in this case, an indictment will lie, at common law, for extorting money by actual duress or by such threats as common firmness is not capable of resisting. Therefore, where money is extorted from a party by the threat of accusing him of an unnatural crime, and from the circumstances of the case the offence does not amount to robbery, (f) there seems no reason to doubt, but that it is indictable as a misdemeanor at common law. (g)

Offences by statutes.

Demanding property with menaces, with intent to steal; accusing, or threatening to accuse of an infamous crime with an intent to extort property, and by such accusation or threat actually extorting; the sending, or delivering of a threatening letter, or writing to any person, thereby threatening to kill or murder, or to burn or destroy, or thereby with menaces demanding property; accusing, or threatening to accuse, or sending or delivering a letter, &c. accusing or threatening to accuse of certain crimes with intent to extort money, &c.; are offences of the degree of felony by the provisions of recent statutes.

4 Geo. 4. c. 54. s. 3. recites 9 Geo. 1. c. 22.

The statute 4 Geo. 4. c. 54. s. 3. recites, that whereas by the 9 Geo. 1. c. 22. s. 1. it is enacted, "that if any person or persons shall knowingly send any letter without any name subscribed thereto, or signed with a fictitious name, demanding money, venison, or other valuable thing, or shall forcibly rescue any person being lawfully in custody of any officer or other person

(d) 11 Mod. 137, more fully stated in 6 East. 133, 134.

(e) *Rex v. Southerton*, 6 East. 126, 140. And see Vol. I. p. 137.

(f) *Ante*, 75, *et sequ.*

(g) See a precedent in 3 Chit. Crim. L. 841.

“ for any such offence, or shall, by gift or promise of money or
 “ other reward, procure any of his Majesty’s subjects to join him
 “ or them in any such unlawful act, every person so offending, being
 “ thereof lawfully convicted, shall be adjudged guilty of felony,
 “ and shall suffer death, as in cases of felony without benefit of
 “ clergy; and whereas by the 27 Geo. 2. c. 15. it is among other and 27 Geo. 2.
 “ things enacted, that if any person or persons shall knowingly c. 15.
 “ send any letter, without any name subscribed thereto, or signed
 “ with a fictitious name or names, letter or letters, threatening to
 “ kill or murder any of his Majesty’s subject or subjects, or to
 “ burn their houses, outhouses, barns, stacks of corn or grain, hay
 “ or straw, though no money or venison, or other valuable thing
 “ shall be demanded in or by such letter or letters, or shall forc-
 “ bly rescue any person being lawfully in custody of any officer or
 “ other person for the said offence, every person so offending,
 “ being thereof lawfully convicted, shall be adjudged guilty of fe-
 “ lony, and shall suffer death, as in cases of felony without benefit
 “ of clergy; and whereas by the 30 Geo. 2. c. 24. s. 1. it is among and 30 Geo. 2.
 “ other things enacted, that all persons who shall knowingly send c. 24.
 “ or deliver any letter or writing, with or without a name or
 “ names subscribed thereto, or signed with a fictitious name or
 “ names, letter or letters, threatening to accuse any person of any
 “ crime punishable by law with death, transportation, pillory, or
 “ any other infamous punishment, with a view or intent to extort
 “ or gain money, goods, wares, or merchandizes from the person
 “ or persons so threatened to be accused, shall be deemed offend-
 “ ers against law, and the public peace, and the court before whom
 “ such offender or offenders shall be tried, shall in case he, she or
 “ they shall be convicted of any of the said offences, order such
 “ offender or offenders to be fined and imprisoned, or to be put in
 “ the pillory, or publicly whipped, or to be transported for the
 “ term of seven years, as the Court, in which any such offender or
 “ offenders shall be convicted, shall think fit and order: and
 “ whereas it is expedient that a lesser degree of punishment And the ex-
pediency of a
lesser punish-
ment, &c.
 “ should be provided for the offence of sending threatening let-
 “ ters, in the cases mentioned in the two first recited acts, and
 “ that the same degree of punishment should be inflicted in the
 “ cases mentioned in the last recited act, and be extended to per-
 “ sons accessory to the said offences;” and then enacts that so
 much of the said recited acts as relates to the sending and de-
 livering letters in the cases therein respectively mentioned shall
 be repealed, and that, “ if any person shall knowingly and wilfully
 “ send or deliver any letter or writing, with or without any name
 “ or signature subscribed thereto, or with a fictitious name or sig-
 “ nature, threatening to kill or murder any of his Majesty’s sub-
 “ jects, or to burn or destroy his or their houses, outhouses, barns,
 “ stacks of corn or grain, hay or straw, or shall procure, counsel,
 “ aid or abet the commission of the said offences, or of any of
 “ them, or shall forcibly rescue any person being lawfully in
 “ custody of any officer or other person for any of the said of-
 “ fences, every person so offending, being thereof lawfully con-
 “ victed, shall be adjudged guilty of felony, and shall be liable, at
 “ the discretion of the Court, to be transported beyond the seas

And enacts
that sending
or delivering
certain threat-
ening letters,
or writing,
shall be fe-
lonies punish-
able by trans-
portation, &c.

“ for life, or for such term not less than seven years, as the Court
 “ shall adjudge, or to be imprisoned only, or to be imprisoned and
 “ kept to hard labour in the common gaol, or house of correction,
 “ for any term not exceeding seven years.”

This statute contained other enactments, and amongst them provided for the punishment of persons who might send letters, &c. threatening to accuse of any *infamous crime*, but the clause containing this enactment, received a construction which caused another statute, the 6 Geo. 4. c. 19. to be passed for the purpose of extending the signification of those words. The latter statute was, however, repealed by the 7 & 8 Geo. 4. c. 27. which also repeals the former statute of 4 Geo. 4. c. 64. except so far as it relates to any person who shall send or deliver any letter or writing threatening to kill or murder, or to burn or destroy as therein mentioned, or shall be accessory to any such offence, or shall forcibly rescue any person being lawfully in custody for any such offence.

7 & 8 Geo. 4.
c. 29.

S. 6. Demands
accompanied
with menaces
or force.

The recent statute 7 & 8 Geo. 4. c. 29. contains several enactments upon the subjects of this chapter.

The sixth section enacts, “ that if any person shall with menaces,
 “ or by force, demand any chattel, money, or valuable security,
 “ of any other person, with intent to steal the same, every such
 “ offender shall be guilty of felony, and, being convicted thereof,
 “ shall be liable, at the discretion of the Court, to be transported
 “ beyond the seas for life, or for any term not less than seven
 “ years, or to be imprisoned for any term not exceeding four years,
 “ and, if a male, to be once, twice, or thrice publicly or privately
 “ whipped, (if the Court shall so think fit,) in addition to such
 “ imprisonment.”

S. 7. Obtain-
ing money,
&c. by threat-
ening to ac-
cuse a party of
an infamous
crime.

The seventh section enacts, “ that if any person shall accuse or
 “ threaten to accuse any other person of any infamous crime, as
 “ hereinafter defined, with a view or intent to extort or gain from
 “ him, and shall by intimidating him by such accusation or threat
 “ extort or gain from him, any chattel, money, or valuable security,
 “ every such offender shall be deemed guilty of robbery, and shall
 “ be indicted and punished accordingly.”

S. 8. Sending
letters con-
taining menac-
ing demands
or threatening
to accuse a
party of an in-
famous crime
to extort mo-
ney, &c.

The eighth section enacts, “ that if any person shall knowingly
 “ send or deliver any letter or writing, demanding of any person,
 “ with menaces, and without any reasonable or probable cause, any
 “ chattel, money, or valuable security; or if any person shall ac-
 “ cuse or threaten to accuse, or shall knowingly send or deliver
 “ any letter or writing, accusing or threatening to accuse any per-
 “ son of any crime punishable by law with death, transportation,
 “ or pillory, or of any assault, with intent to commit any rape, or
 “ of any attempt or endeavour to commit any rape, or of any in-
 “ famous crime, as hereinafter defined, with a view or intent to
 “ extort or gain from such person any chattel, money, or valuable
 “ security; every such offender shall be guilty of felony, and, being
 “ convicted thereof, shall be liable, at the discretion of the Court,
 “ to be transported beyond the seas for life, or for any term not
 “ less than seven years, or to be imprisoned for any term not ex-
 “ ceeding four years, and, if a male, to be once, twice, or thrice
 “ publicly or privately whipped, (if the Court shall so think fit,) in
 “ addition to such imprisonment.”

The ninth section, for defining what shall be an infamous crime within the meaning of the act, enacts, "that the abominable crime " of buggery, committed either with mankind or with beast, and " every assault with intent to commit the said abominable crime, " and every solicitation, persuasion, promise, or threat offered or " made to any person, whereby to move or induce such person to " commit or permit the said abominable crime, shall be deemed to " be an infamous crime within the meaning of this act."

S. 9. What shall be deemed an infamous crime.

The offences to which these statutes apply seem to be, I. The sending or delivering any letter or writing threatening to kill or murder, or to burn or destroy houses, &c. II. Demanding property with menaces, with intent to steal. III. Accusing or threatening to accuse of an infamous crime, with an intent to extort or gain, and thereby extorting or gaining. IV. Sending or delivering any letter or writing demanding, with menaces, and without any reasonable cause, any chattel, &c. V. Accusing or threatening to accuse any person of any of the crimes mentioned in the act, with an intent to extort, &c. VI. Sending or delivering any letter or writing, accusing or threatening to accuse any person of any such crimes, with a like intent.(a)

Different kinds of offences.

Some of the cases decided upon the repealed clauses of the 9 Geo. 1. c. 22., the 27 Geo. 2. c. 15., and the 30 Geo. 2. c. 24. may assist in the construction of the recent statute.

The construction of the statute 9 Geo. 1. c. 22. was much considered, in a case, where the prisoner, Michael Robinson, was indicted for sending a certain letter, dated, &c. without any name subscribed thereto, to one J. O. Oldham, demanding of him a certain valuable thing, namely, a bank note, against the form of the statute. The letter, on which the indictment proceeded, was as follows :

Robinson's case. As to the demand within the repealed clause of 9 Geo. 1. c. 22.

Sir,

I am well pleased to find that I am not likely to be mistaken in the idea I have entertained of you amongst men of a proper and liberal way of thinking : an understanding, on such a matter as this, is the easiest thing imaginable ; and, in repeating that you

(a) The recited and repealed clauses of the statutes 9 Geo. 1. c. 22., 27 Geo. 2. c. 15., and 30 Geo. 2. c. 24. created different offences. It was once submitted that the offence in the 30 Geo. 2. c. 24. was the same as that contained in the 9 Geo. 1. c. 22.; but the Judges denied this, saying that the 9 Geo. 1. c. 22. extended to such cases only in which there was an *actual demand*, whereas the 30 Geo. 2. c. 24. applied to cases which fell short of a demand, and included letters sent *with a view or intent* to extort money, though no demand were made; and, therefore, that the 30 Geo. 2. c. 24. was no repeal of the 9 Geo. 1. c. 22. Robinson's case, 2 Leach 749. 2 East. P. C. c. 23. s. 2. p. 1110. There were in fact important differences between

these recited and repealed clauses in respect of the *demand*. The 9 Geo. 1. c. 22. required that there should be a demand of money, venison, or other valuable thing. Under the 27 Geo. 2. c. 15. no demand of any thing was necessary. And the 30 Geo. 2. c. 24. applied only to cases where the letter or writing fell short of an actual demand, and was sent with a view or intent to extort or gain money, goods, wares, or merchandizes. In 2 East. P. C. c. 23. s. 2. p. 1115. it is said, that upon the conference in Robinson's case, it was agreed by all the Judges, that if an indictment were framed upon the statute 30 Geo. 2. c. 24. and a demand proved, there must be an acquittal.

will find me a gentleman, I wish you to be satisfied that I am as incapable of taking any unmanly advantage, as of wantonly sporting with the feelings of any one; I have ever despised and execrated the cowardly assassin, who, skulking in obscurity, sends forth his malignant shafts to wound the peace and the character of individuals; and I have, therefore, uniformly resisted every overture that has been made me for such a purpose. My situation as a literary character has teemed with temptations: but a sacred principle of honour has superseded them all. The subject on which I have addressed you has long lain dormant; and it was because I thought the attack of a most serious complexion, that I hesitated for such a length of time in giving any countenance to it. Not that I ever sought for any circumstance to influence my judgment, or qualify my opinion; and for all that has ever come to my knowledge, it may be all *the moonshine of the moment*; I am, therefore, so far candid, and, I trust, not indelicate; and it will at least be a satisfaction to you, to be told, with a solemnity becoming the character I have professed myself, that not a soul, but myself, is in possession of a line of the MS., nor has it ever been out of my hands, or perused or heard by any person living, since first I had it; so that when it is committed to the flames, *all* will necessarily die with it. Of this you shall have a testimony so clear and unequivocal that it will not be possible for you afterwards to doubt. Thus much I have suggested for your satisfaction. You will now give me leave to say something on behalf of *the cause* I have engaged in. I have not the least objection to an interview, and I readily close with your proposition; but there are a few preliminaries which I must first beg leave to adjust. Perhaps I may be more anxious to urge them, in order to have some proof of your sincerity; after which I am at your service. In order to relieve a destitute and unhappy family, struggling with sickness and sorrow, you will permit me to be your almoner. Will you enable me to dispose of a little of your money, as I shall see occasion? It is a duty I owe to the cause of humanity to urge it. Remember, Sir, I am now only making my appeal to your *benevolence*. I am holding out no delusions to exact the involuntary tribute. I am asking you, as a gentleman, as a man, to give me some earnest of your intention to prove what I am so strongly inclined to give you credit for. Inclose a bank-note in a letter addressed to R. R. and let it be left at the Cambridge coffee-house, the top of Newman-street, in Goodge-street, on the side of the bar. At the entrance of the coffee-room is a bracket for letters; let it be placed there between the hours of eleven and one, on Thursday next; and at five o'clock, on the same day, a line shall be sent by a porter, to your house to acknowledge the receipt; after which, if you will name any day (Friday excepted) in the following week, on which it will suit you, in the evening, to take a bottle of wine at the King's-head-tavern, in Middle-row, Holborn, or elsewhere, I will, with pleasure, attend you. Our meeting, however, is to be private; and *tête à tête*. Thus, possibly, over the ashes of the MS. a phoenix may arise, that may prove the forerunner to friendship. I shall send to the coffee-house between the hours of one and four; and I will venture to

say, that you will have no reason to be dissatisfied with the event of this correspondence. To obtain confidence, it is necessary, or, at least reasonable, to expect that one should be reposed. I have the honour to remain,

Sir,
Your obedient humble servant,
R. R.

“ Tuesday, 12th January, 1796.

J. O. Oldham, Esq.

Brook-street,
(*Private.*) Holborn.”

It appeared, upon the evidence, that the prosecutor had served an apprenticeship with a person named Dolly, by whom he was afterwards taken into partnership; that upon Dolly's death, which happened a few years afterwards, a report was spread that the prosecutor had been the author of his death, upon which he brought an action against two persons, and had judgment against them; that, before the letter in question was sent, several other letters had been written, by the prisoner, to the prosecutor, to which he returned answers, for the purpose of obtaining information of the prisoner's place of abode in order to bring him to justice. And all these letters were read in evidence, as serving to explain the letter upon which the prisoner was indicted. It was intimated in them that another person who was a friend of the prisoner's, and who was in distress, had put certain MSS. into his hands, containing a charge of the prosecutor's having murdered his former master, Dolly, and afterwards married the widow, his accomplice; but that the prisoner was unwilling to publish the MS. containing so serious a charge, without giving a previous intimation to the prosecutor, and hearing what he had to propose upon the subject. A subsequent correspondence between the prosecutor and the prisoner was also given in evidence; in the course of which the prisoner communicated a few pages of the supposed MS. in verse, from which the charge alluded to was to be plainly inferred. Upon this evidence the learned Judge, before whom the prisoner was tried, left the case to the jury to say whether the prisoner sent the letter, above set forth, and whether it contained a threat to publish a libel on the prosecutor, imputing to him the death of Dolly, unless he would send the prisoner a bank note; and, in case they were of that opinion, they were directed to find the prisoner guilty. The jury found him guilty; and also found specially, that the prisoner sent the letter in the indictment, and that it contained a threat to publish a libel, imputing to the prosecutor the murder of his master, in order to extort money from him.

Several objections were taken to this conviction: and amongst others it was objected that the letter did not contain a *threat or demand*, so as to bring the case within the statute 9 Geo. 1. c. 22. But the twelve Judges, after hearing the point argued, all agreed in over-ruling the objection. Buller, J., in delivering their opinion, after adverting to the preamble of the statute, (upon which the counsel for the prisoner had founded his argument, by con-

tending that it necessarily so far restrained the enacting clause that the demand contained in a letter must be direct and peremptory and accompanied with a threat of bodily harm) said:—"Where the enacting clause of a statute refers to such offences only as are contained in the preamble, it may be restrained by the preamble: but in this case it would be doing violence to very plain words, and repealing some of the obvious provisions of the statute, if it were so restrained. It is no uncommon thing for the preamble of a statute to recite a particular mischief, as the cause of making it, and yet for the enacting part to embrace more general objects, and to extend to other cases which the legislature thought within the mischief. If the enacting clause in this case were to be restrained by the preamble, the statute would apply only to cases where several persons had joined together in confederacy; where the letter was signed with a fictitious name only; and where venison or money was demanded; and not to a letter without a name, nor to a demand of any other valuable thing than money or venison, nor to any demands by such letters, whether accompanied with a threat of bodily harm or not. But the enacting clause expressly applies to a single offender; to a letter sent without a name, as well as to one signed with a fictitious name; and to a demand of any valuable thing as well as of money or venison; and also to all demands by such letters, whether accompanied with a threat of bodily harm or not. I agree that a mere request, such as asking charity, without imposing any conditions, would not come within the sense or meaning of the word '*demand*,' but here the demand was made under a threat that if it was not complied with, the prisoner would publish a libel against the prosecutor, imputing to him the death of his master: for this is the construction which the jury by their verdict have expressly put upon the letter. Now, whether the letter does amount to such a demand or not, is a question for the Judges to determine, upon reading it as it is stated in the record; and they are all clearly of opinion that this is a *demand* within the true intent and meaning of this statute. It is a demand of money or money's worth, (which a bank-note is) by holding out a threat to impute murder to the prosecutor, and to injure his fame and his character; and not a request of voluntary charity." (c)

Girdwood's case. Question left to the jury, whether a letter contained an actual threatening to kill or murder, within the repealed clause of 27 Geo. 2. c. 15.

In the following case, upon the statute 27 Geo. 2. c. 15., it was holden that the construction of the letter, namely, the question whether it contained, in the terms of it, an actual threatening to kill or murder, was properly left to the jury. The first count of the indictment charged the prisoner generally with feloniously sending to the prosecutor a certain letter in writing, with the fictitious letters J. W. thereunto subscribed, threatening to kill and murder the prosecutor. (e) In the second count the letter was set out in the following form:—

(c) Robinson's case, 1796, 2 Leach 749. 2 East. P. C. c. 23. s. 2. p. 1110.

(e) See *post*. 586, as to the neces-

sity of setting out the letter in the indictment.

"Sir,

February 9, 1776.

"I am sorry to find a gentleman like you would be guilty of taking *Mac Allester's* life away for the sake of two or three guineas; but it will not be forgot by one who is just come home to revenge his cause. This you may depend upon, whenever I meet you, I will lay my life for him in this cause. I follow the road, though I have been out of London; but on receiving a letter from *Mac Allester*, before he died, for to seek revenge, I am come to town. I remain a true friend to *Mac Allester*."

"J. W."

The learned Judge, before whom the prisoner was tried, left it to the jury to consider whether this letter contained in the terms of it an actual threatening to kill or murder; directing them to acquit the prisoner if they thought that the words might import any thing less than to kill or murder. The jury found the prisoner guilty; but judgment was respited to take the opinion of the twelve Judges upon this point, (amongst others) *viz.* whether the letter purported to be a letter threatening to kill or murder? And ten Judges, who were present at the conference, were all clearly of opinion that the conviction was right; and that the construction of the letter was properly left to the jury.⁽ⁱ⁾

It was holden, however, in a subsequent case, by the majority of the Judges, that as the letter in question did not, by *necessary construction*, import a threat to burn the prosecutor's farm-house and buildings, a conviction upon the statute 27 Geo. 2. c. 15. was wrong. The letter was as follows:—

Jepson and Springett's case, upon the same repealed statute. Holden that as the letter did not, by necessary construction, import a threat to burn, &c. a conviction upon that statute was wrong.

Mr. Woodgate, Sir,

March 3d, 1798.

I am very sorry to acquaint you that we are determined to set your mill on fire, and likewise to do all the public injury that we are able to do you, in all your *farms and seteres*,^(k) which you are in possession of, without you on next ^(l) day release that Ann Wood which you put in confinement. Sir, We mention in a few lines, that we hope if you have any regard for your wife and family, you will take our meaning without any thing further, and if you do not we will persist as far as we possibly can, so you may lay your hand at your heart and strive your uttermost ruin. I shall not mention nothing more to you, until such time as you find the few lines a fact, with our respect. So no more at this time from me,

R. R.

Upon the trial, Mr. Woodgate, the prosecutor, swore, that he had had a share in a mill three years before this letter was written, but had no mill at that time; but that he held a farm when

⁽ⁱ⁾ *Girdwood's case, cor. Hotham, B., O. B., 1776, and East. T. 1776, 1 Leach 142. 2 East. P. C. c. 23. s. 4. p. 1121. The prisoner was executed.*

^(k) It is said that by this was understood "settings or lettings;" and that the whole letter was evidently

the production of an illiterate person, being falsely spelt nearly throughout. 2 East. P. C. c. 23. s. 2. p. 1115, note ^(a).

^(l) In 2 East. *ibid.* the learned writer says, that the word at this part was unintelligible in his copy.

the letter was written and came to his hands, and still held it, with several buildings upon it. It was objected that this was not such a letter as comprehended the offence in the act of parliament; and the prisoner having been convicted, the point was submitted to the consideration of the Judges, who agreed (except Eyre, C. J., who was absent) that as the prosecutor had no such property at the time as the mill which was threatened to be burnt, that part of the letter must be laid out of the question. As to the rest of the letter, Lord Kenyon, C. J., and Buller, J., were of opinion that it must be understood as also importing a threat to burn the prosecutor's farm-house and buildings; but the other Judges not thinking that a necessary construction, the conviction was holden wrong, and a pardon recommended. (m)

A letter signed with initials only, was considered as a letter without a name within the repealed clause of 9 Geo. 1. c. 22.

It was decided that the sending a letter signed with initials only, was a sending a letter *without a name*, within the statute 9 Geo. 1. c. 22. Buller, J., in delivering the opinion of the Judges on this point, said, "Whether the letter be with or without a name is a simple fact appearing on the face of the letter itself. It is signed with two letters, R. R., which are so far from being a name, that no man, on looking at the letter only, can tell whether it meant to refer to any name, or what that name was." (n)

A charge of an intent to extort money, not supported by proof of an intent to extort a bill of exchange.

In a case where the indictment, which was framed upon the statute 30 Geo. 2. c. 24., charged the prisoner with sending a threatening letter, intending "to extort and gain money," it was holden not to be supported by evidence of a letter threatening to accuse the prosecutor of an unnatural crime if he did not give up a certain bill drawn by the prisoner, and of which the prosecutor was the holder. (o)

Sending a letter, knowing the contents.

In a case where the question arose whether there was sufficient evidence of the prisoner's having sent the letter in question, knowing its contents, the facts were that the prosecutor proved the receipt of the letter, by the penny post, at his house, in a street near Berkeley-square, in the county of *Middlesex*; and his tracing it up to one Elizabeth Robinson, who swore that she was employed in going errands for the prisoners in Newgate; and that having received this letter from the prisoner's hands at the grate at Newgate she immediately carried it to the post-office in Newgate-street. And the servant of the office-keeper confirmed her account; and both swore to the identity of the letter, the direction being in a remarkable hand. The case was left to the jury with a direction to consider whether from the prisoner's delivering the letter he knew the contents of it; and the jury, having found the prisoner guilty, the question was submitted to the consideration of the Judges; whether there were sufficient evidence to be left to the jury of the prisoner's sending the letter, knowing the contents? The Judges held that the conviction was right. (p)

(m) *Rex v. Jepson and Springett*, cor. Lord Kenyon, C. J., *Essex Sum.* Ass. 1798, and considered of by the Judges in *Mich. T. 1798.* 2 East. P. C. c. 23. s. 2. p. 1115.

(n) Robinson's case, 2 Leach 749.

2 East. P. C. c. 23. s. 2. p. 1110. *Ante*, 579.

(o) Major's case, O. B., 1796, and *Mich. T. 1796.* 2 Leach 772. 2 East. P. C. c. 23. s. 3. p. 1118.

(p) Girdwood's case, O. B. 1776,

In a case where the prisoners were indicted for sending a letter, the proof was that the letter was of the handwriting of one of the prisoners, and that it was thrown by the other prisoner into the yard of the prosecutor, from whence it was taken by a servant of the prosecutor, and delivered to him.(q) And in another case the proof was that the letter in question was in the handwriting of the prisoner who sent it to the post-office from whence it was sent in the usual manner to the prosecutor.(r) In another case, where it was proved that the prisoner dropped the letter into a vestry-room, which the prosecutor frequented every Sunday morning, before service began, from whence the sexton had picked it up, and delivered it to him, the learned Judge said that it seemed to be very immaterial whether the letter were sent directly to the prosecutor, or were put into a more oblique course of conveyance, by which it might finally come to his hands.(s) And in a subsequent case it was holden that dropping a letter in a person's way, in order that such person might pick it up, was a *sending* of the letter to such person.(t) In a case upon the repealed clause of the 27 Geo. 2. c. 15. it was decided, that in order to bring the offence within that clause, it was necessary to prove that the letter was sent to the person threatened: and also that sending it to A., in order that he might deliver it to B., was a sending to B., if it were so delivered. A letter, threatening to burn the house of Rodwell, and the stacks of Brook, was sent to Kirby, and the indictment charged the sending it to Kirby. Upon a case reserved, the Judges held that a sending to Kirby, as Kirby was not threatened, was not within the statute; and upon that account the judgment was arrested: but they intimated, that if Kirby had delivered it to Rodwell or Brook, and a jury should think that the prisoner intended he should so deliver it, this would be a sending by the prisoner to Rodwell or Brook, and would support a charge to that effect.(u)

Sending the letter by the post, or by indirect means.

Easter T. 1776. 1 Leach 142. 2 East. P. C. c. 23. s. 4. p. 1120. *Ante*, 582.

(q) *Rex v. Jepson and Springett*, cor. Lord Kenyon, C. J., *Essex* Sum. Ass. 1798, and *Michaelinas T.* 1798. 2 East. P. C. c. 23. s. 2. p. 1115. *Ante*, 583.

(r) *Heining's case*, cor. Chambre, J., *Warwick* Sum. Ass. 1799. 2 East. P. C. c. 23. s. 2. p. 1116.

(s) *Lloyd's case*, cor. Yates, J., *Hereford* Spr. Ass. 1767. 2 East. P. C. c. 23. s. 5. p. 1123. The case was submitted to the consideration of the Judges on another point in which the indictment was holden to be defective (see *post*. 586.), so that it became unnecessary for them to give any opinion on the point above stated. In 2 East. P. C. *ub. sup.* the learned writer in note (a) says, "Qu. whether, if one intentionally put a letter in a place where it is likely to be seen and read by the party

"for whom it is intended, or to be found by some other person, who it is expected will forward it to such party, and the letter do accordingly reach its intended destination, this may not be said to be a sending to such party, supposing such an allegation to be necessary upon the true construction of the acts? The same sort of evidence was given in *Springett's case*, (*ante*, 583.) in support of the allegation of sending a threatening letter to the prosecutor, and no objection was made on that ground. And the general current of precedents is in the same form."

(t) *Rex v. Wagstaff*, Mich. T. 1819, Russ. & Ry. 398.

(u) *Rex v. Paddle*, East. T. 1822, Russ. & Ry. 484. And it seems from this case, that it must appear upon the indictment that the letter was sent to the party threatened.

The indictment must set forth the letter.

It was decided, upon reference to the Judges, that it was necessary to set forth the threatening letter in the indictment, in order that the Court might see whether it fell within the purview of the respective statutes. It was contended, in support of the indictment, upon which the point was raised, that it pursued the words of the statute 9 Geo. I. c. 22.; (now repealed) that the defendant was charged with sending the letter "feloniously and contrary to the form of the statute;" and that those words imported that the letter was of such a nature as the statute had in view. But the Judges were of opinion that the indictment was bad in not setting forth the letter itself; and that if the words "feloniously and contrary to the form of the statute," were allowed to supply the place of the letter, it would be leaving it to the prosecutor to put his own interpretation upon it, and to the jury the construction of the matter of law. (x)

And the intent of the writer should be alleged correctly.

It was also held to be necessary that the indictment should allege an intent of the writer in sending the letter consistent with and deducible from the letter itself. It appeared in a case already mentioned that where the indictment charged that the letter was sent to extort money, and it appeared upon the face of the letter that it was sent with the view of inducing the prosecutor to give up a bill of exchange, the Judges held the allegation not to be sustained. (y)

Place where offence may be tried.

The statute 9 Geo. I. c. 22, provided that offences against that act might be tried in any county of England; but no such provision being made with respect to offences within the other repealed statutes, the trial of such offences was governed by the general rule. Upon this rule the trial might be in the county in which the prosecutor received the letter by the post, though delivered by the prisoner and put into the post in another county. (z) And it seems that the offender might be tried in the county in which he sent the letter, though the prosecutor received it in another county. The offence of sending a threatening letter, would seem to be complete, as far as depends on the offender, by his putting the letter into the post-office to go into another county; though the party to whom it is sent afterwards receives it in the latter county. (a) The post-office marks in town or country, proved to be such, are evidence that the letters on which they appear were in the office to which those marks belong at the dates

(x) Lloyd's case, *ante*, note (s). And the law of this case was recognized by Grose, J., in delivering the opinion of the twelve Judges in Hunter's case, 2 Leach 631.

(y) Major's case, *ante*, 584.

(z) Girdwood's case, 1 Leach 142. 2 East. P. C. c. 23. s. 4. p. 1120, *ante*, 582. where the letter was received by the prosecutor in Middlesex, and the trial had in that county, though the letter was delivered by the prisoner to a woman in London, and by her put into the office which was also in London. Esser's case, 2 East. P. C. c.

23. s. 7. p. 1125. where the offence was laid in Middlesex, though the letter was dated from Maidstone, in Kent, and sent by the post from Maidstone; and Lord Mansfield held that as the letter was directed to the prosecutor in Middlesex, where it was delivered, that was a sending in Middlesex, and that the whole was to be considered as the act of the defendant to the time of the delivery in that county.

(a) 2 East. P. C. c. 23. s. 7. p. 1125. 3 Burn. Just. Letter. And see now 7 Geo. 4. c. 64. s. 12. *Addend.* to Vol. I.

which the marks specify: but a mark of double postage paid on any such letter is not of itself evidence that the letter contained an inclosure. (b)

From a case which was cited in a former part of this Chapter, it appears that prior and subsequent letters, from the prisoner to the party threatened, may be given in evidence as explanatory of the meaning and intent of the particular letter on which the indictment is framed. (c)

Prior and subsequent letters may be given in evidence.

(b) *Rex v. Plumer, Russ. & Ry.*
264.

(c) *Robinson's case, ante, 579.*

BOOK THE SIXTH.

OF EVIDENCE.

CHAPTER THE FIRST.

OF WITNESSES.—WHAT WITNESSES ARE COMPETENT TO GIVE EVIDENCE.—WHAT FACTS COMPETENT WITNESSES MAY DISCLOSE AND WHAT ARE PRIVILEGED COMMUNICATIONS.—HOW WITNESSES ARE TO BE EXAMINED.—HOW THE CREDIT OF WITNESSES MAY BE IMPEACHED.—HOW MANY WITNESSES ARE SUFFICIENT.—AND HOW THE ATTENDANCE OF WITNESSES IS TO BE COMPELLED AND REMUNERATED.

BEFORE entering upon the subject of the competency of witnesses, to which the following section will be appropriated, it may be proper to pay attention to a few points applicable to the law of evidence in criminal prosecutions generally.

Rules of evidence the same in criminal as civil cases.

There is no difference as to the rules of evidence between criminal and civil cases. What may be received in the one case may be received in the other: and what is rejected in the one ought to be rejected in the other. (a) A fact must be established by the same evidence, whether it is to be followed by a criminal or a civil consequence. (b)

Bill of exceptions to evidence.

It is doubtful whether a bill of exceptions lies in any criminal case. (c) In the case of *Rex v. The Inhabitants of Preston* (d) Lord Hardwicke mentioned it as a point not settled; and in the same case he said that a bill of exceptions had never been determined to lie in mere criminal proceedings though he had known it allowed in informations in the court of Exchequer. If the

(a) By Abbot, J., in *Rex v. Watson*, 2 Stark. 155.

(b) Lord Melville's case, 29 How. St. Tr. 763.

(c) Sir H. Vane's case, 1 Lev. 68.

S. C. Kel. 15. 1 Sid. 85. Hawk. P. C. b. 2. c. 46. s. 210. *Rex v. Lord Paget and Others*, 1 Leon 5. *Rex v. Nutt*, 1 Barnardist. 307. 1 Phill. Ev. 296.

(d) Cas. temp. Hardw. 251.

Judge who presides at the trial shall be of opinion that there is doubt whether he may not have admitted some evidence or witness improperly, he may, in his discretion, forbear to pass sentence, or he may respite the judgment, until the opinion of the twelve judges be obtained upon a case reserved. If the case were clearly made out by proper evidence in such a way as to leave no doubt of the guilt of the prisoner in the mind of any reasonable man, such a conviction ought not to be set aside because some other evidence was given which ought not to have been received : but if the case without such improper evidence were not so clearly made out, and the improper evidence might be supposed to have had an effect on the minds of the jury, it would be otherwise. (e) Case reserved.

Where the defendant has been convicted on an indictment for felony, there can be no new trial ; but after a conviction for a misdemeanor, a new trial may be granted, at the instance of the defendant, where the justice of the case requires it : (f) though inferior jurisdictions cannot grant a new trial upon the merits, but only for an irregularity. (g) Where several defendants are tried at the same time for a misdemeanor, and some are acquitted, and others convicted, the court may grant a new trial as to those convicted, if they think the conviction improper. (h) And it is a rule that all the defendants convicted upon an indictment for a misdemeanor, must be present in court when a motion is made for a new trial on behalf of any of them, unless a special ground be laid for dispensing with their attendance. (i) No new trial can be had, when the defendant is acquitted, although the acquittal was founded on the misdirection of the Judge. (j) New trial.

SECTION I.

What Witnesses are Competent.

By the competency of a witness is meant his admissibility to give evidence ; if he is incompetent, (of which the court is to Of the competency of witnesses.

(e) *Rex v. Ball*, Russ. and Ry. C. C. R. 133. *Rex v. Oldroyd*, *ibid.* 89. but see *Rex v. Harling*, Ry. & M. C. C. R. 39.

(f) *Rex v. Mawbey*, 6 T. R. 638. Tidd 942, 943. As to the grounds on which the application may be made, see 1 Chit. Cr. L. 654.

(g) See the cases collected on this point in note (b) to *Rex v. Inhabitants of Oxford*, 13 East 416. The Court of King's Bench in that case refused a *certiorari* to remove an indictment for a misdemeanor and proceedings thereon at the assizes, after

conviction and before judgment, which was prayed for the purpose of applying for a new trial, on the Judge's report of the evidence, on the ground of the verdict being against evidence and the Judge's direction.

(h) *Rex v. Mawbey*, 6 T. R. 619.

(i) *Rex v. Teal*, 11 East. 307. *Rex v. Askew*, 3 M. & S. 9. Tidd. 943.

(j) *Rex v. Cohen and Jacob*, 1 Stark. N. P. C. 516. In a prosecution for not repairing a highway judgment has been suspended under very special circumstances after an acquittal, see Vol. I. p. 535. in the notes.

judge,) (*k*) he is to be totally excluded from giving his testimony; if he is competent, it will then be for the Jury to decide whether his evidences, when given, is entitled to credit.

All persons are admissible witnesses who have the use of their reason, and such religious belief as to feel the obligation of an oath; who have not been convicted of any infamous crime; and who are not influenced by interest. (*a*) The causes of incompetency therefore to be considered are, 1. Defect of understanding. 2. Defect of religious belief. 3. Infamy; and therewith of the evidence of accomplices. 4. Interest; and therewith of the incompetency of husband and wife.

Want of understanding.
Idiots.

Deaf and dumb.

Lunatics.

Children.

1. Persons incompetent from want of understanding. Idiots (*b*) are not admissible to give evidence. By the word 'Idiot' is meant a fool or madman from his nativity, who never has any lucid intervals. (*c*) A person deaf and dumb from his nativity (though in presumption of law an idiot), (*d*) if he is capable of conversing by signs, and has a proper sense of the obligation of an oath, may be admitted as a witness and examined with the assistance of an interpreter. (*e*) So lunatics are incompetent; that is, persons usually mad, but having intervals of reason; (*f*) during which times they are competent. (*g*) With respect to children, the rule now seems to be, that their competency does not depend on their age; but that a child of any age may be examined, if capable of distinguishing between good and evil: (*h*) but whatever be its age, it cannot be examined without being sworn. (*i*) Whether the infant be competent or not is a question for the discretion of the Court. (*k*) There is no difference in respect of the competency of children between capital cases and misdemeanors. (*l*) Where the child has appeared not sufficiently to understand the nature and obligation of an oath, Judges have often thought it necessary for the purposes of justice to put off the trial of a prisoner, directing that the child in the meantime should be properly instructed. (*m*) When the child is incompetent to be sworn, the account which it has given of the transaction to others is inadmissible. (*n*)

Defect of religious belief.

2. Of incompetency from defect of religious belief. The rule as now settled, appears to be, that, as far as regards this kind of incompetency, infidels of this and all other countries, who yet believe in a God, the avenger of falsehood, are admissible as witnesses; and the only persons incompetent are those who do not believe in a God, the dispenser of future rewards and punish-

(*k*) 2 Hale P. C. 277.

(*a*) Per Lawrence, J., in *Jordaine v. Lashbrooke*, 7 T. R. 610. 1 Phil. on Evid. 17.

(*b*) Com. Dig. Testmoign, A. 1.

(*c*) See *ante*, Vol. I. p. 7.

(*d*) *Ibid*.

(*e*) 1 Phill. Ev. 18. *Ruston's case*, 1 Leach C. C. 408.

(*f*) *Ante*, Vol. I. p. 7.

(*g*) Com. Dig. Testmoign, A. 1.

(*h*) *Ante*, Vol. I. p. 565. By such capability must be understood a belief in God, or in a future state of

rewards and punishments; from which the Court may be satisfied that the witness entertains a proper sense of the danger and impiety of falsehood. *Ibid*.

(*i*) See further on this subject, *ante*, Vol. I. 565, 566.

(*k*) 2 Stark. Ev. 393.

(*l*) *Rex v. Travers*, 2 Stra. 700.

(*m*) *Ante*, Vol. I. 566. Phill. Ev. 19. But this must not be done in order that an adult may become capable, *Ibid. post*. p. 592.

(*n*) 1 Phill. Ev. 19.

ments; (o) and it should seem that it makes no difference whether the belief is that such dispensation is to take place in a present or in a future state of existence. "Such infidels," says Lord C. J. Willes, in the case of *Omichund and Barker*, (p) "who either do not believe a God, or if they do, do not think that he will either reward or punish them *in this world or in the next*, cannot be witnesses in any case, nor under any circumstances, for this plain reason, because an oath cannot possibly be any tie or obligation to them."

The proper method, however, of administering the oath must vary according to that which the proposed witness himself considers most obligatory; (q) for, "as the purpose is to bind his conscience, every man of every religion should be bound by that form which he himself thinks will bind his own conscience most." (r) Therefore, a Mahometan should be sworn on the *Alcoran*; (s) a Jew on the *Pentateuch*, with his head covered; (t) a Gentoo according to his peculiar forms. (u) So a witness professing Christianity, but declining to swear on the New Testament, was allowed to be sworn on the Old Testament, upon stating, that he should consider such oath binding on his conscience. (v) But although it is highly desirable that a witness should be sworn according to the form which he considers most binding on himself, yet, if he has taken the oath in the usual form administered in our courts of law, without objecting to it, and upon being questioned whether he considers the oath he has taken as binding on his conscience, he answers in the affirmative, he cannot then be further asked whether there be any other mode of swearing more binding on his conscience than that he has already used. (w) For if the witness says he considers the oath as binding on his conscience, he does, in effect, affirm that in taking that oath, he has called his God to witness that what he shall say will be the truth, and that he has imprecated the Divine vengeance on his head, if what he shall afterwards say is false; and having done that, it is perfectly unnecessary and irrelevant to ask any further questions. (x)

Method of administering the oath.

The proper method of examining a witness, if the examination tends merely to try his *competency* in respect to religious principle, is not to question him as to his particular opinions, (as whether he believes in Jesus Christ,) but to enquire whether he believes in the existence of a God, the obligation of an oath, and

Proper mode of examination as to opinions.

(o) 1 *Phill. Ev.* 22.

(p) *Willes's Rep.* 549.

(q) *Ibid.*

(r) By Lord Mansfield, in *Atcheson v. Everitt*, *Cowp.* 389.

(s) *Morgan's case*, 1 *Leach* 54.

(t) *Willes*, 543. 1 *Phil. Ev.* 23.

(u) 1 *Phil. Ev.* 23. 1 *Chit. Crim. L.* 591.

(v) *Edmonds v. Rowe*, 1 *Ry. & Mood.* 77. *cor. Bossanquet*, *Serj.*

(w) *The Queen's case*, 2 *Brod. & Bing.* 285.

(x) *Ibid.* See also *Sells v. Hoare*,

3 *Brod. & Bing.* 232., where, on an application for a new trial, it appeared that a witness who had been sworn as a Christian, on the Gospels, was a Jew; and the Court refused to grant a rule, being unanimously of opinion that the oath as taken was binding on the witness both as a moral and religious obligation: and Richardson, J., observed, that if the witness had sworn falsely, he might be convicted of perjury under the oath he had taken.

Trial cannot
be postponed
until an adult
is instructed.

a future state of rewards and punishments : (y) but if the examination be previous to swearing the witness, for the purpose of ascertaining what form of administering the oath will be most proper, as most binding on the witness's conscience, it is said to be not irregular to examine him as to his opinions ; as, whether he believes in the Gospels on which he is about to be sworn. (z) If a material witness, who is an adult, and of sufficient intellect, has no idea of a future state of rewards and punishments, it is not proper to discharge the jury, and postpone the trial, in order that the witness may have an opportunity of being instructed upon that subject before the next assizes ; as may be done in the case of a child. (a)

Quakers.

Quakers are excluded from giving evidence, not indeed from defect of religious principle, but owing to their refusal, upon religious scruples, to take any oath at all. Their solemn affirmation by several statutes (b) is admitted in courts of justice to have the same effect as an oath in all civil, but not in criminal cases. It is, however, receivable in cases which are only technically criminal, (c) as in penal actions, (d) but excluded in all proceedings substantially criminal, (e) as on a motion for an information for a misdemeanor. (f) But where the application to the Court is *against* a Quaker, his affirmation may be received in his own defence, though the proceeding be of a criminal nature. (g)

Excommunicated persons.

Previous to the statute 53 Geo. 3. c. 127. there was great doubt whether persons excommunicated by the ecclesiastical courts were competent witnesses : (h) but by that statute, excommunication is not to be pronounced, except in certain cases ; and by section 3., in those cases, parties excommunicated shall incur no civil disabilities.

Infamy.
What offences
create incompetency.

3. Of incompetency from infamy. There are certain offences of which if a person be convicted, he becomes incompetent to give evidence. Such are treason, felony, (i) and every species of the *crimen falsi*, such as forgery, perjury, subornation of perjury, attain of false verdict, and other offences of the same description, which involve the charge of falsehood and affect the public administration of justice. (j) So a conviction of bribing

(y) *Rex v. Taylor*, Peake N. P. C. 11. by Buller, J., 1 Phil. Ev. 24. ; and according to the judgment of Willes, C. J., in *Omichund v. Barker*, Willes 541. *ante*, p. 591. it seems sufficient if the witness believes in such a state either in this world or the next.

(z) 1 Phil. Ev. 24.

(a) *Rex v. Wade*, Ry. & Mood. C. C. R. 86.

(b) 7 & 8 W. 3. c. 34. 8 Geo. 1. c. 6. 22 Geo. 2. c. 46. s. 36.

(c) 1 Phil. Ev. 25.

(d) *Atcheson v. Everett*, Cowp. 382.

(e) 1 Phil. Ev. 25.

(f) *Rex v. Wych*, 2 Stra. 872. *Rex v. Gardner*, 2 Burr. 1117.

(g) 1 Phil. Ev. 25. *Rex v. Gardner*, 2 Burr. 1117. A bill is now pending

in parliament, by which their affirmation is to be admitted in criminal, as well as civil cases.

(h) Gilb. Ev. 130.

(i) By statute 31 Geo. 3. c. 35. it was enacted, that no person should be incompetent by reason of a conviction for petit larceny. But this act is repealed by stat. 7 & 8 Geo. 4. c. 27. And by stat. 7 & 8 Geo. 4. c. 29. every larceny shall be deemed to be of the same nature, and subject to the same incidents in all respects as grand larceny was before the commencement of that act.

(j) 2 Hale P. C. 277. Com. Dig. Testm. A. 3, 4. Co. Lit. 6 b. 1 Phil. Ev. 27.

a witness to absent himself and not give evidence, (*k*) Barratry (*l*) or præmunire. (*m*) And a witness is disqualified by attain of conspiracy at the suit of the king; (*n*) that is, of a conspiracy to accuse another of a capital offence; for then he is to have a villainous judgment, and lose the freedom of the law; (*o*) but it is otherwise when he is attainted of a conspiracy at the suit of the party; (*p*) and in a case before Sir W. Scott in the Admiralty Court, it was held, that a conviction for a conspiracy to raise the funds by spreading false rumours, would not render an affidavit of the party convicted inadmissible. (*q*) But a conviction for a conspiracy to bribe a person (summoned as a witness on an information against the revenue laws,) not to appear before the justices of the peace, renders the convict incompetent. (*r*) A conviction for keeping a public gaming house has been held not to make a witness incompetent; (*s*) though a person convicted of winning by fraud or ill practice in certain games, seems rendered incompetent by stat. 9 Ann. c. 14, 15.; for besides inflicting a penalty, that statute enacts that he shall be deemed infamous. (*t*) Outlawry in a personal action, does not create incompetency: (*u*) but it is otherwise of outlawry for treason or felony; for a judgment of outlawry for treason or felony, appearing on the record by the sheriff's return of the exigent, has the same effect as judgment after verdict or confession. (*v*) It follows, therefore, that such an outlaw cannot be a competent witness. (*w*)

It was formerly thought that incompetency on the ground of infamy might arise, not only from conviction of the offences already mentioned, but from the infliction of certain infamous punishments, as the pillory; (*x*) but it is now clearly settled, that it is the nature of the crime, and not the species of the punishment which renders the party infamous, and disqualifies him from giving evidence. (*y*) Therefore a person convicted of barratry, and merely fined, is incapacitated from being a witness, though subjected to

The nature of the punishment immaterial.

(*k*) Clancey's case, Fortesc. 209. and *Bushell v. Barrett*, 1 Ry. & Mood. 434.

(*l*) *Rex v. Ford*, 2 Salk. 690.

(*m*) Com. Dig. Testm. A. 5. Co. Lit. 6 b.

(*n*) Co. Lit. 6 b. Com. Dig. Testm. A. 5.

(*o*) 1 Phil. Ev. 28. 2 Hale P. C. 277.

(*p*) 1 Phil. Ev. 28. 2 Hale P. C. 277. *Saville v. Roberts*, Carth. 416.

(*q*) *Case of Ville de Varsovie*, 2 Dods. 174. *Ante*, p. 574. *Abbott, C. J.*, in *Crowther v. Hopwood*, 3 Stark. 22. admitted a witness under the same circumstances, and said, "I believe Sir W. Scott came to that decision in the case of *Ville de Varsovie*, after much deliberation; and if I mistake not, he conferred with some of the Judges upon the point, before he pronounced his judgment:" but his Lordship reserved the point as one deserving the greatest

consideration. It never came before the Court, as the verdict rendered the decision of it immaterial to the case.

(*r*) *Bushell v. Barrett*, Ry. & Mood. N. P. C. 434. by Littleale and Gaselee, Js.

(*s*) *Rex v. Grant*, Ry. & Mood. N. P. C. 270. *cor. Abbott, C. J.*

(*t*) 1 Phil. Ev. 28.

(*u*) Co. Litt. 6 b. Com. Dig. Testm. A. 5.

(*v*) 3 Inst. 212. Hawk. P. C. b. 2. c. 48. s. 22.

(*w*) *Celier's case*, Sir T. Raym. 369. 1 Phil. Ev. 29.

(*x*) *Gilb. 127. 2 Hale P. C. 277.* The punishment by the pillory was abolished, in all cases except perjury, and subornation of perjury, and that of fine or imprisonment, or both, substituted, by stat. 58 Geo. 3. c. 138.

(*y*) *Gilb. 127. Bull. N. P. 292. 2 Hawk. P. C. c. 46. s. 102.*

no infamous punishment;(z) while a person who has been in the pillory for a libel on government, is competent.(a)

Proof of judgment necessary to exclude.

In order to exclude a witness on the ground of his being infamous, it is necessary to prove him convicted by the production of the record,(b) not only of his conviction, but of the judgment thereon;(c) for the conviction may possibly have been quashed on a motion in arrest of judgment.(d) And the record must have a caption.(e) And even an admission by the witness himself, that he had been convicted of grand larceny, and was then under sentence upon such conviction, was held insufficient to remove the necessity of producing the record.(f) And an admission by a witness, that he has been guilty of perjury on another occasion, affords no objection to his competency, whatever effect it may have on his credit.(g)

Incompetency from infamy how removed.

The incompetency arising from infamy may be removed: 1st. By endurance of punishment. 2dly. By pardon. 3dly. By reversal of the judgment.

1. By endurance of punishment.

In felonies not punishable with death.

1st. By the construction of statute 18 Eliz. c. 7. s. 2. and the operation of stat. 6 Geo. 4. c. 25. s. 2., Endurance of the punishment adjudged in all felonies not punishable by death, amounts to a statutory pardon, and consequently removes all the incompetency of the convict. The stat. 18 Eliz. c. 7. s. 2. (which was passed to abolish purgation before the ordinary) enacted that persons admitted to benefit of clergy, should no longer be delivered to the ordinary for purgation, but "after the clergy allowed, and burning in the hand, should forthwith be enlarged and delivered out of prison." In the construction of this statute it was held, that the burning in the hand should operate as a statute pardon; for as the old mode of purgation was taken away by the act, the burning in the hand should have the same effect as the purgation, viz. the convict should be absolved from infamy, and discharged from the punishment, incapacity, and discredit, incident to felony.(h) And now by stat. 6 Geo. 4. c. 25. s. 2. it is enacted, that where any offender hath been, or shall be convicted of felony within the benefit of clergy, (which since the statute 7 & 8 Geo. 4. c. 28. s. 6. abolishing benefit of clergy, must, it is presumed, be taken to mean felonies not punishable by death,) and hath endured, or shall endure the punishment to which such offender shall be adjudged for such felony, the punishment so endured shall have the like effect as if he had been burned or marked according

6 Geo. 4. c. 25.

(z) *Rex v. Ford*, Salk. 690. *Pendock v. Mackender*, 2 Wils. 18. Bull. N. P. 292. 2 Hawk. P. C. c. 46. s. 102.

(a) Gilb. 127.

(b) *Rex v. Castell* Carcinion, 8 East. 79. Com. Dig. Testm. A. 5. Bull. N. P. 292. 2 Hawk. P. C. c. 46. s. 104.

(c) Gilb. 128. Com. Dig. Testm. A. 5.

(d) Gilb. 129. 1 Phil. Ev. 30.

(e) *Cooke v. Maxwell*, 2 Stark. c. 183. *cor. Bayley, J.*

(f) 8 East. 78.

(g) *Rex v. Teal*, 11 East. 309. *Rands*

v. Thomas, 5 M. & S. 244.

(h) 1 Phil. Ev. 31. *Hoston's case*, cited in *Foxley's case*, 8 Rep. 110. *Searle v. Williams*, Hob. 292. *Celier's case*, Sir T. Raymond, 369. *Lord Castlemain's case*, ib. 380. *Kelyng. 37. 2 Hale P. C. 278. Rex v. Burridge*, 3 P. Wms. 486. The burning in the hand comes instead of purgation at the common law, which supposeth he might not be guilty, notwithstanding the verdict. *Per Hyde, C. J. Kelynge, J., & Wilde, Recorder. Kelyng. 37, 38.*

to the provisions of statutes 4 Hen. 7. c. 13. 21 Jac. 1. c. 6. 3 W. & M. c. 9. 4 & 5 W. & M. c. 24., and 6 & 7 W. & M. c. 14. The result therefore is, that endurance of any punishment adjudged in felonies, not capital, is equivalent to endurance of the burning in the hand, and consequently to a restoration of competence. (i) Where a man was convicted of grand larceny, sentenced to transportation for seven years, and confined in the hulks for that time and then discharged, it was held, that his suffering seven years aboard the hulks, in execution of sentence of seven years' transportation, operated as a statute pardon; and that his having escaped twice during such confinement, for a few hours each time, did not destroy the effect of it. (j)

A bill is now before parliament, by which it is enacted, that no misdemeanor shall render a party an incompetent witness, after he has undergone the punishment adjudged for the same. The statute, if the bill passes into a law before this work is published, will be found in the Addenda.

In misdemeanor.

2dly. It was formerly doubted whether pardon could do more than take away the punishment, leaving the crime and its disabling consequences unremoved. (k) But it is now settled, that a pardon, whether by the King or by an act of parliament, removes not only the punishment, but all the legal disabilities consequent on the crime. (l) This effect will be produced by a pardon in misdemeanors as well as felonies, wherever the disability is a consequence of the judgment; but where it is declared by an act of

2. By pardon. Proof of pardon.

(i) It may perhaps be doubted whether the stat. 7 & 8 Geo. 4. c. 28. s. 6. by abolishing benefit of clergy, has not inadvertently prevented burning in the hand (or its now equivalent, endurance of punishment) from amounting to a statute pardon, and working a restoration of competency. For, it may be said, burning on the hand could only be construed as a statutory pardon, when those on whom it was inflicted had already been allowed their clergy: and, as there can exist now none to whom clergy can be allowed, so there can be no case in which the mere endurance of the burning (or that which has been made to amount to it) can operate as a pardon. A bill however is now pending in parliament which will remove all doubt on this point, for it is thereby enacted, that where any offender hath been or shall be convicted of any felony not punishable with death, and hath endured or shall endure the punishment to which such offender hath been or shall be adjudged for the same, the punishment so endured shall have the like effect as a pardon under the great seal. See Addenda.

(j) *Rex v. Badcock, Russ. & Ryan*, 248. Before the statute 6 Geo. 4. c. 25. s. 2. felons within clergy were in many cases restored to their compe-

tency by suffering the punishment awarded by the judgment. Thus in cases where, instead of burning in the hand, some other punishment had been substituted by act of parliament, as transportation by stat. 4 Geo. 1. c. 11. s. 5., or a fine or whipping, by stat. 19 Geo. 3. c. 74. s. 3., they were by the provisions of these statutes made competent after suffering such substituted punishment. But endurance of the punishment adjudged would not so have operated, unless it had been one of those so substituted for burning in the hand, *Rex v. Harling, Ry. & Mood. C. C. R.* 39.

(k) *Gilb. Ev.* 128. *Brown v. Crashaw*, 2 Bulst. 154. *Harris v. White*, Palm. 412. *Wicks v. Smallbrooke*, 1 Sid. 52. It was said, "Pœna potest tolli culpa pœrennis erit."

(l) *Cuddington v. Wilkins*, Hob. 67, 81. 2 Hale P. C. 278. *Crosby's case*, Salk. 689. S. C., 1 Lord Raym. 39. *Rookwood's case*, 4 State Trials, 681. S. C. Cas temp. Holt, 685. by Treby, C. J., in *Lord Warwick's case*, 5 State Trials, 171. *Rex v. Ford*, 2 Salk. 690. *Bentley v. Bishop of Ely*, Fitzg. 107. And a pardon by which the King remits the burning in the hand will have the same effect, *Rookwood's case*, *Lord Warwick's case*, *ubi supra*.

parliament to be part of the punishment, as in the case of perjury or subornation of perjury on the stat. 5 Eliz. c. 9.(m) the King's pardon will not make the witness competent.(n)

If the pardon be conditional, the performance of the condition ought to be shewn, for on that depends all its validity.(o) Thus where the pardon is on condition of transportation for a number of years, the witness is not competent before the expiration of the term, or other lawful determination.(p)

Before the statutes 6 Geo. 4. c. 25., and 7 & 8 Geo. 4. c. 28., in order to prove that a witness after conviction had been restored to his competency by pardon, the general rule was, that it was necessary to produce the pardon itself under the great seal: the privy seal, or sign manual, being held only warrants, and counter-mandable.(q) But now by the former of these statutes, (s. 1.) it is enacted, that in all cases in which the King shall be pleased to extend his royal mercy to any offender convicted of *any felony whereby the offender is excluded from benefit of clergy*, and by warrant under sign manual, countersigned by one of the secretaries of state, shall grant to the offender either a free pardon or a pardon upon condition of transportation, imprisonment, or other punishment, the discharge of such offender out of custody in case of a free pardon, and the performance of the condition in case of a conditional pardon, shall have the effect of a pardon under the great seal for such offender, as to the felony of which he has been convicted. And by the latter of these statutes, (s. 13.) this enactment is enlarged to cases where the royal mercy is extended "to any offender convicted of any felony punishable with death or otherwise." These statutes it will be observed do not extend to misdemeanors.

3. Reversal of judgment. 3dly. The incompetency may be removed by a reversal of the judgment or outlawry, which must be proved by producing the record.

In Lord Lovat's case,(r) where it was objected that the witness had been attainted by an act of parliament, which subjected him to all the penalties of an attainder, unless he surrendered before a certain day, it was allowed to be shewn that the witness surrendered conformably to the act; and the record of the proceeding, commenced on the part of the crown, and defended on the part of the witness by a plea of surrender, which the Attorney-General confessed to be true, was allowed to be conclusive evidence of the fact of his surrender within the limited time.(s)

Consequence of incompetency-

The consequence of incompetency from infamy is, that as the

(m) This statute provides, that the person convicted shall never be admitted to give evidence in courts of justice, until the judgment be reversed.

(n) *Rex v. Gripe*, 1 Lord Raym. 257. *Rex v. Ford*, 2 Salk. 690. *Gilb. Ev.* 128. *Bull. N. P.* 292. *Dover v. Maestaer*, 5 Esp. 94. by Lord Ellenborough. The authorities on the effects of the King's pardon, as to the restoration of competency, are all collected and commented upon with great learn-

ing by Mr. Hargrave, in the second volume of his *Juridical Arguments*, p. 221.

(o) *Hawk. P. C. b. 2. c. 37. s. 45.*

(p) *Rex v. Burridge*, 3 P. Wms. 439. 1 *Phil. Ev.* 35.

(q) *Lord Warwick's case*, 5 *Harg. State Trials*, 4th ed. 171. by Treby, C. J. *Rex v. Miller*, 2 W. Black. 798. *Gully's case*, 1 *Leach* 98.

(r) 9 *St. Tr.* 652, 665.

(s) 1 *Phil. Ev.* 31.

party cannot be a witness, so he cannot make affidavits to support a complaint against others,^(s) but he may to exculpate or defend himself. ^(t) Thus he is not disabled from making an affidavit in relation to the irregularity of a judgment to which he is a party; ^(u) for otherwise he must suffer all injustice, and could have no way to help himself. ^(v) He is for some purposes of evidence considered as dead. Thus, if he be the subscribing witness to a bond, his hand-writing may be proved, as if he were dead. ^(w)

tenacy from infamy.

The competency of accomplices, as it arises out of the rules of law relating to incompetency from infamy, may be properly considered in this place. It has already appeared in the investigation of the latter subject, that, though it be shewn by a witness's own admission, that he has been guilty of an infamous crime, he will not be deemed incompetent without other proper proof that he has been convicted of it: from which it necessarily follows, that the testimony of an avowed accomplice with the prisoner at the bar is not to be excluded from being given against him; and accordingly it has been long a settled rule, that an accomplice may give evidence against his associates, provided he has not been already convicted: ^(x) so he may indeed, even after a conviction, if judgment has not passed, for it is not the conviction, but the judgment that creates the disability. ^(y) And not only if two or more persons are accomplices, may one, who is not indicted, be a witness against the others; but he may also be so, it seems, when he is indicted jointly with his partners in guilt, ^(z) (although it is not usual or proper to include him in the indictment ^(a),) provided he has not been put on his trial at the same time with the others. ^(b) It was formerly thought that an accomplice *separately* indicted for the same offence, could not be a witness against his associate, unless he had first pleaded guilty to his indictment; ^(c) but the rule is now otherwise. ^(d) It is also now perfectly settled, though contrary to one great authority, ^(e) that no promise of pardon or reward, whether absolute or conditional, will render an accomplice incompetent, ^(f) although the circumstances under which his evidence is given ought to have great weight with a jury in considering the credit to which such evidence is entitled. The practice of admitting the testimony of accomplices and the promise of pardon, express or implied, under which they usually give their evidence, were introduced instead of the ancient system of approvement, which Lord Hale, in his

Accomplices.

Evidence against the prisoner.

Indicted separately.

Promise of pardon or reward.

Approvement.

(s) *Davis's case*, 2 Salk. 461. *Walker v. Kearney*, 2 Stra. 1148. 2 Hawk. c. 46. s. 103.

(t) *Davis's case*, 2 Salk. 461. *Charlesworth's case*, cited 2 Stra. 1148.

(u) 2 Salk. 461.

(v) 2 Hawk. c. 46. s. 103.

(w) *Jones v. Mason*, 2 Stra. 833.

(x) 2 Hawk. P. C. c. 46. s. 94, 95. *Tonge's case*, Kel. 17, 18. 1 Hale P. C. 303, 304.

(y) 1 Phil. Ev. 38. And the information of a dead accomplice, taken by a justice of the peace, may be read in evidence against the prisoner. *Rex v. Westbeer*, 1 Leach 12.

(z) 1 Hale P. C. 305.

(a) *Ibid.*

(b) *Stark. Rv. Pt. IV. p. 22.* In *Rex v. Rowland and Others*, indicted for a conspiracy, *Abbott, C. J.*, held that the counsel for the prosecution had a right, before opening his case, to the acquittal of any defendant he intended to call as a witness. 1 Ry. & Mood. N. P. C. 402.

(c) *Sir Percy Cresby's case*, 1 Hale P. C. 303.

(d) 1 Phil. Ev. 38.

(e) *Lord Hale*, 2 P. C. 280.

(f) *Tonge's case*, Kel. 17. *Layer's case*, 6 St. Tr. 259. 2 Hawk. P. C. c.

Pleas of the Crown, speaks of as having been already long dis-used.(g) Approvement was when a prisoner, arraigned for treason or felony, confessed the fact before plea pleaded, and appealed or accused others his accomplices of the same crime, in order to obtain his pardon.(h) He was also bound to discover on oath, not only the particular crime charged upon him, but all treasons and felonies of which he could give any information.(i) It was purely in the discretion of the Court to permit the approvement or not; if they allowed it, the party accused was put on his trial: whereon, if he was convicted, the approver had his pardon *ex debito justitiæ*:(j) if he was acquitted, the approved received judgment of death upon his own confession of the indictment.(k)

All the good that could be expected from this method of approvement is now more fully provided for and secured by one of the following methods: 1st, In the case of offences relating to coining and uttering counterfeit money, the statutes 6 & 7 W. 3. c. 17. s. 12., and 15 Geo. 2. c. 28. s. 8., enact, that if any such offender, being out of prison, shall discover two or more persons who have committed the like offences, so as they may be convicted thereof, he shall be entitled to a pardon.(l) 2dly, By special proclamation in the Gazette or otherwise, pardon is sometimes promised upon certain conditions. Accomplices within these two classes have a *right* to pardon.(m) 3dly, By the practice most usually adopted, accomplices are admitted to give evidence for the Crown, under an implied promise of pardon, on condition of their making a full and fair confession of the truth.(n) On a strict and ample performance of this condition, to the satisfaction of the Judge presiding at the trial, (although they are not of right entitled to pardon,) they have an equitable title to a recommendation for the King's mercy.(o) They cannot plead this in bar to an indictment against them, nor can they avail themselves of it as a defence on their trial, though it may be made the ground of a motion for putting off the trial, in order to give the prisoner time for an application in another quarter.(p) And if an accomplice, after being received as a witness against his companions, breaks the condition on which he is admitted, and refuses to give full and fair information, he will be sent to trial to answer for his share of guilt in the transaction.(q) It is not a matter of course to admit an of-

46. s. 135. 1 Hale P. C. 304. 1 Phil. Ev. 38. Stark. on Ev. Pt. IV. p. 22.

(g) 2 Hale 226.

(h) 4 Black. Com. 330.

(i) 2 Hale P. C. 227.

(j) 4 Black. Com. 330.

(k) *Ibid.*

(l) *Ibid. Ante*, Vol. I. p. 82.

(m) *Rex v. Rudd*, Cowp. 334., by Lord Mansfield in giving judgment. S. P. S. C. Leach 118. 4th edit.

(n) *Ibid.* 1 Phil. 37.

(o) *Ibid.* This equitable claim to pardon does not protect an accomplice from prosecutions for other offences in which he was not concerned with the Prisoner. 1 Phil. Ev. 37. n.

7. *Rex v. Lee*, Russ. & Ry. C. C. R. 361. *Rex v. Brunton*, *ibid.* 454. S. C. MS. Burn's Just. by Chetwynd, tit. Approver. With respect to such offences, therefore, he is not bound to answer on his cross-examination. West's case, MS. 1 Phil. Ev. *ubi supra*. But the Judges will not in general admit an accomplice as King's evidence, if it appear that he is charged with any other felony than that on the trial of which he is to be a witness. This was stated by Mr. Justice Park in several cases on the Oxford Spring circuit, 1826, Carr. Crim. L. 67.

(p) 1 Phil. Ev. 37.

(q) *Ibid.* In a late instance, a prisoner who had made a confession,

fender as witness on the trial of his associates, not even after he has been so allowed by the committing magistrate. The practice is, (where the accomplice is in custody,) for the counsel for the prosecution to move that the accomplice be allowed to go before the Grand Jury, pledging his own opinion, after a perusal of the facts of the case, that his testimony is essential.(r)

In prosecutions for a misdemeanor in receiving stolen goods, on the repealed statute 22 Geo. 3. c. 58., the principal felon, though not convicted or pardoned, was a competent witness against the receiver.(s) So the principal felon may be a witness under statute 4 Geo. 1. c. 10. s. 4., against a party indicted for taking a reward to help to stolen goods.(t) So in an information under 2 Geo. 2. c. 24.(u) for bribery at an election, a person who has received a bribe may be a witness against the defendant, though in case of a conviction he would be indemnified from the penalties of the act.(v)

Principal felon a witness.

Information for bribery.

It being established that an accomplice is a competent witness, the consequence is inevitable, that if credit be given to his evidence, it requires no confirmation from another witness.(w) And therefore, in strictness, if the jury believe the evidence of an accomplice, they may legally convict a prisoner upon it, though it stands totally uncorroborated.(x) But from a consideration of the situation of the witness, it is the practice (resting, however, wholly in discretion(y),) for the Court to direct the jury to acquit the prisoner, unless part of the accomplice's testimony be confirmed by unimpeachable evidence.(z) This confirmation need not extend to every part of the accomplice's evidence, for there would be no occasion to use him at all as a witness, if his narrative could be completely proved by other evidence, free from suspicion. But the question is, whether he is to be believed upon points which the confirmation does not reach. And if the jury

Accomplice's evidence alone sufficient.

What confirmation usually required.

after a representation made to him by a constable in gaol, that his accomplices had been taken into custody, which was not the fact, and who, after having been admitted as a witness against his associates, on a charge of maliciously killing sheep, upon the trial denied all knowledge of the subject, was afterwards tried and convicted upon his confession. *Rex v. Burley, cor. Garrow, B. Leicester Lent Assizes, 1818.* And the conviction was afterwards approved of by all the Judges. MS. Stark. on Ev. Pt. IV. p. 23.

(r) Stark. on Ev. Pt. XIV. p. 23. If, however, the accomplice be carried before the Grand Jury, by means of a surreptitious and illegal order, the indictment so found is good: *Doctor Dodd's case*, 1 Leach 155. 4th edit.

(s) *Ante*, p. 259.

(t) See *ante*, p. 262. *Jonathan Wilde's case*, 1 Leach 17. n. (s).

(u) *Ante*, Vol. I. p. 157.

(v) *Bush v. Rawlins*, cited by Lord Mansfield in *Clarke v. Shee*, Cowp. 199. *Mead v. Robinson*, Willes 422.

(w) By Lord Ellenborough in *Rex v. Jones*, 2 Campb. 133.

(x) *Rex v. Atwood*, 1 Leach 464. also cited by Grose, J., in *Jordaine v. Lashbrooke*, 7 T. R. 609. *Rex v. Durham*, 1 Leach 478.

(y) *Rex v. Durham, ubi supra.*

(z) *Smith and Davis's case*, 1 Leach 479. in n. (a) to *Durham's case*. They were tried for robbing George Hunter. During the night the prosecutor was attacked by four ruffians, whose persons he was unable to identify; but during the scuffle he had torn a piece of the coat which one of them had on, who on being discovered by this means turned King's evidence, and implicated the two prisoners. But the Court, although it was admitted as an established rule of law that the uncorroborated testimony of an accomplice is legal evidence, thought it too dangerous to suffer a

find some part of his evidence satisfactorily corroborated, this is a good ground for them to believe him in other parts, as to which there is no confirmation. (a) Accordingly, where an accomplice was examined on the part of the prosecution, who was confirmed in the testimony which he gave as to some of the prisoners, but not as to the rest, Mr. Justice Bayley told the jury, that if they were satisfied by the confirmatory evidence which had been given, that the accomplice was a credible witness, they might act upon that testimony with respect to others of the prisoners, although as far as his evidence affected them it had received no confirmation; and all the prisoners were convicted. (b) To the same effect is a case mentioned by Lord Ellenborough in *Rex v. Jones*, (c) as having been within a few years referred to the twelve Judges, where four men were convicted of burglary on the evidence of an accomplice, who received no confirmation concerning any of the facts which proved the criminality of one of the prisoners; but the Judges were unanimously of opinion, that the conviction of all four was legal, and upon that opinion they all suffered the sentence of the law. (d)

Accomplice
evidence for
prisoner.

An accomplice is a competent witness for his associates as well as against them, even when they are severally indicted for the same offence, whether he is convicted or not, provided he be not disqualified by a judgment. (e) Where there is not any or very slight evidence against one of several prisoners indicted and tried together, the court will sometimes direct the jury to give their verdict as to him, and upon their acquittal of him admit his testimony for the others. (f) In a case where one of the defendants on an indictment for an assault submitted and was fined, and paid the fine, Pratt, C. J., allowed him to be a witness for the other, considering the trial at an end with respect to him. (g) But on a joint indictment against several for a misdemeanor, a defendant who suffers judgment by default cannot be a witness for the other defendants. (h)

Incompetency
from interest.

4. Of incompetency from interest.—All witnesses interested in the event of a suit are to be excluded from being witnesses in favour of that party to which their interest inclines them. They are excluded from a supposed want of integrity, and not as some have supposed that they may be saved from the temptation to com-

conviction to take place on his unsupported testimony, and the prisoners were acquitted.

(a) 1 Phil. Ev. 39. Stark. Ev. Pt. IV. p. 29.

(b) *Rex v. Dawber*, 3 Stark. N. P. C. 34.; in note (a) to which the learned reporter remarks, that in judging of the credit due to the testimony of an accomplice, it seems to be a necessary principle, that his testimony must be wholly received as that of a credible witness, or wholly rejected.

(c) 2 Camp. 133.

(d) So in *Birkett's case*, Russ. & Ry. C. C. R. 252., the Judges were of opinion that an accomplice did

not require confirmation as the person he charged, if he was confirmed in the particulars of his story.

(e) Stark. Ev. Pt. IV. p. 22. 2 Hale P. C. 280. citing the case of *Bilmore*, Gray, and *Harbin*, 2 Roll. Abr. 685. pl. 3. *Bath* and *Montague's case*, cited in *Lock v. Hayton*, *Fortesc.* 246.

(f) 2 Hawk. P. C. c. 46. s. 98. *Rex v. Bedder*, 1 Sid. 237. Stark. Ev. Part IV. p. 23.

(g) *Rex v. Fletcher*, 1 Str. 633. *Rex v. Shearman and Idle*, Cas. temp. Hardw. 303. 1 Phil. Ev. 69.

(h) *Rex v. Lafone and Others*, 5 Esp. N. P. C. 155.

mit perjury. (g) It becomes necessary therefore to consider what is and what is not such a disqualifying interest. The rule at present completely established, (though at variance with several old decisions,) is, that the interest to disqualify must be some *legal, certain, and immediate* interest in the event of the suit, or in the record as an instrument of evidence available on future occasions in support of the witness's own interest. (h) But it is no objection to the competency of a witness, that he may have wishes or a strong bias on the subject matter of the proceeding, or that he may expect some benefit from the result of the trial. Such circumstances may influence his mind and affect his *credibility*; they are therefore always open to observation and ought to be carefully weighed by the jury who are to determine what dependence they can have on his testimony; but they will not render him incompetent. (i) Thus no tie of relationship (except that of husband and wife, to be hereafter noticed) will create a disqualifying interest. A father may give evidence for his son, or the son for his father, for though his consanguinity may influence his testimony and affect his credit, it will not make him incompetent. So a witness is not to be excluded because he stands in the same situation as the party for whom it is proposed he should give evidence; (j) nor because he believes himself interested in the result of the proceedings; (k) nor because he believes himself under an honorary obligation to pay the costs. (l) It is not thought necessary to cite any of the *civil* cases supporting these rules; they will be found abundantly and clearly stated and applied, in the treatises already referred to on this subject: but it may be expedient to notice some of the most striking *criminal* cases, particularly those which on the ground of necessity, or by statutory provisions, are at variance with the general principles of evidence. Informers who are entitled to a part of the penalty, are not good witnesses to support a conviction, unless by the particular provisions or policy of several acts of parliament. (m) So it has been held that on an indictment for a forcible entry and detainer under stat. 5 R. 2. and Jac. 1., the party grieved is not a competent witness, for in case of a conviction

What interest disqualifies.

What interest does not disqualify.

Cases of disqualifying interest.

(g) 1 Phill. Ev. 42. If a witness is interested in the event of a suit, he cannot give any evidence of any nature whatever for the party with which his interest sides. Thus on an indictment against a township for not repairing a highway, a person of another township in the parish seems not to be a competent witness for the prosecution, even to prove the road to be a common highway: though it may be said, that to such extent he charges himself and his testimony is against his own interest, *Ibid.* p. 64. So in an action of ejectment a witness who admits he is to have a lease of the premises, in case the defendant is turned out of possession by the ejectment, is as incompetent to prove the defendant in possession of the

premises as to prove any material fact necessary for the support of the action, *ibid.*

(h) 1 Phil. Ev. 52. Stark. Ev. Pt. IV. p. 744. *Smith v. Prager*, 7 T. R. 65. Rosc. Ev. 65.

(i) 1 Phil. Ev. 45.

(j) 1 Phil. Ev. 45.

(k) 1 Phil. Ev. 50. But it has been said that if he thinks he has an actual legal interest he is incompetent, *Ibid.* 52. Case of *L'Amitié*, 5 Rob. Adm. Rep. 344. Rosc. Ev. 67. See however Phil. *ubi supra*, and Stark. Ev. Part IV. p. 746.

(l) 1 Phil. Ev. 51.

(m) 1 Phil. Ev. 117. *Ante*, p. 276. Where a statute can receive no execution, unless a party interested be witness, there he must be allowed, for the

Cases of competency.
Party injured.

tion he will be entitled to restitution. (*n*) So on a prosecution against several persons for a conspiracy, the wife of one of the defendants has been holden not to be a competent witness for the others, a joint offence being charged, and an acquittal of all the other defendants being a ground of discharge for her husband. (*o*) A person indicted as accessory before or after the fact would in most cases be incompetent as a witness for the principal, for his acquittal would enure to the accessory's discharge. (*p*) If a man hath the promise of the goods or lands of the party attainted, he is no lawful witness of a treason. (*q*) Inhabitants of a parish, indicted for not repairing a highway, are not competent to give evidence for the defendants. (*r*) In cases of Forgery, it has been often decided, that a party by whom an instrument purports to be made is not to be admitted to prove it forged, if, in case of its being genuine, he would either be liable to be sued upon it or be deprived by it of a legal claim against another. (*s*) This however is an anomaly depending on decided cases rather than upon the principles of the rule above stated. (*t*) And a bill is now pending in parliament, by which it is enacted, that no person shall be deemed to be an incompetent witness in support of a prosecution for forgery, or for uttering forged instruments, by reason of any interest which he may have or be supposed to have in the instrument forged. The statute, if the bill passes into a law before this work is published, will be found in the Addenda. But with this exception it is a general rule that in criminal prosecutions the party injured may be a witness. (*u*) Thus it is the constant practice on an indictment for robbery, to admit the evidence of the party robbed. (*v*) And the prosecutor is competent notwithstanding he be entitled to a restitution of his property on conviction of the thief, (*w*) or to a reward on conviction, by virtue of particular statutes or by proclamation; (*x*) or in consequence of the voluntary offer of a reward which has been held out in order to ensure the apprehension and conviction of offenders. (*y*) So a witness is competent upon an indictment for tearing a promissory note payable to him, (*a*) or for extorting a bond from him, (*b*) or for usury, although he was the borrower of the money and has not

statute must not be rendered ineffectual by the impossibility of proof, Gilb. Ev. 114.

(*n*) *Rex v. Beavan*, 1 Ryan & Mood. N. P. C. 242. *cor.* Littledale, J.

(*o*) *Ante*, p. 570. But where a woman was called to give evidence for the crown, whose husband lay under sentence of death, and she said she supposed and hoped that the conviction of the prisoner would be the means of procuring her husband's pardon, she was admitted as a witness, and the objection held to go to her credit and not to her competency, *Rudd's case*, 1 Leach 127.

(*p*) *Stark. Ev. Pt. IV. p. 764.*

(*q*) 1 Hale P. C. 303.

(*r*) *Ante*, vol. 1. p. 334.

(*s*) *Ante*, p. 374, *et sequ.*

(*t*) *Ante*, p. 374, *et sequ.*

(*u*) For it is not to be presumed that a witness in a public prosecution is actuated by revengeful or improper motives, and he has in general no legal interest beyond that of any other witness, *Stark. Ev. Part IV. p. 771.*

(*v*) 1 Phil. Ev. 112. *Rudd's case*, 1 Leach 132. *per cur.*

(*w*) By stat. 21 H. 8. c. 11.

(*x*) 1 Leach 132. *Rioters' case* in note to *Nowland's case*, *ibid.* 314.

(*y*) 1 Phil. Ev. 120. *Stark. Ev. Part IV. p. 773.* 1 Leach 132, 314, note. So where a prosecutor had laid a wager that he should convict the defendant, he was held competent, *Rex v. Fox*, 1 Stra. 652.

(*a*) *Rex v. Moise*, 1 Stra. 595.

(*b*) *Stark. Ev. Part IV. p. 772.*

repaid it; (c) so for cheating him of money by false pretences; (d) or upon an information for fraudulently procuring him to execute a cognovit. (e) In the earlier cases, the decisions seem to have proceeded upon the ground of necessity; for it was said that in such private transactions nobody else can be a witness of the circumstances of the fact but he that suffers; and in cases where no such necessity existed, the party defrauded was in most instances considered incompetent, upon the supposition that he might avail himself of the verdict in some future proceeding, so as to entitle himself to a remedy for the injury, or protect himself against the effects of the fraud. (f) But it is now held that the party aggrieved cannot avail himself of the record of the conviction in any future suit in order to prove the criminal act. (g) And it is also an established rule that a court of equity will not grant relief on a conviction, which proceeds on the evidence of the prosecutor. (h) Upon these considerations the party injured is allowed to be witness on an indictment for perjury, whether the suit in which the perjury was committed, either at law or in equity, be at an end or not. (k) And it has been considered that even if the indictment for perjury proceeds on the stat. 5 Eliz. c. 9. which gives the prosecutor half the forfeiture incurred, there would be no objection to his competency, since in an action to recover his moiety, he would be precluded from giving the conviction in evidence. (l)

Where any indictment has been removed by certiorari from the quarter-sessions to the Court of King's Bench, notwithstanding the prosecutor in that case, if the defendant be convicted, is by stat. 5 & 6 W. & M. c. 11. entitled to his costs, yet he is allowed as a witness; for, as is remarked by Parker, C. J., if the giving of costs should take off the evidence of the prosecutor, that act of parliament which was designed to discountenance the removal of suits by certiorari would give the greatest encouragement to them that is possible. (m) It seems also that prosecutor of an indictment for not repairing a highway is competent, although he may be in the result liable to costs. (n) In prosecutions against private persons

Certiorari.

Costs.

Inhabitants.

(c) Reg. v. Sewell, 7 Mod. 118. Smith v. Prager, 7 T. R. 60.

(d) Reg. v. Mackartney, 1 Salk. 286.

(e) Rex v. Parris, 1 Sid. 431.

(f) Stark. Ev. Part IV. p. 771.

(g) 1 Phil. Ev. 112. Bartlet v. Pickersgill, 4 East. 577. n. (b) Rex v. Boston, 4 East. 581. Smith v. Rummen, 1 Campb. 9. Hathaway v. Barrow, 1 Campb. 151. Burdon v. Brown- ing, 1 Taunt. 520.

(h) Bartlet v. Pickersgill, Rex v. Boston, *ubi supra*.

(k) Rex v. Boston, 4 East. 572. *Ante*, Book V. c. 1. p. 546. It was once held necessary to shew the judgment in the suit satisfied, on the ground that the party might possibly make use of the

conviction for the purpose of obtaining relief in equity, *Ante*, Book V. c. 1. p. 546.

(l) *Ante*, Book V. c. 1. p. 546. But see Stark. Ev. Part IV. p. 774. where it is said that where a statute gives a specific remedy to the party injured he is as much disqualified for a witness in a criminal prosecution as if he sought the remedy by a civil action; and therefore that upon an indictment for a perjury upon the statute he is not a good witness although he would have been a good witness upon an indictment at common law, see also Gilb. Ev. 111. Bull. N. P. 289.

(m) Reg. v. Muscot, 10 Mod. 193.

(n) *Ante*, Vol. I. p. 334.

Of county. or corporate bodies for not repairing bridges, inhabitants of counties may be witnesses by the stat. 1 Ann. stat. 1. c. 18. s. 13. (o) Even before this statute such evidence had been thought admissible from necessity. (p) In all cases relative to the execution of the highway act, the inhabitants of a parish or place are competent witnesses by stat. 13 Geo. 3. c. 78. s. 77. (q) and by s. 68. of the same act, the surveyor of the parish or place is a competent witness, though part of his salary may arise from forfeiture. Where pecuniary penalties are directed to be applied to the use of the poor, or for the benefit and exoneration of the parish or other place, the inhabitants are rendered competent witnesses on the trial of the offender, by stat. 27 Geo. 3. c. 29. provided the penalty imposed by the act of parliament does not exceed twenty pounds. Before this act, an inhabitant rated to the poor would have been incompetent. (r)

Removal of incompetency from interest. As to the removal of the incompetency of a witness, who appears to be interested, by a release, see *ante*, p. 377.

Husband and wife; for each other; against each other; not competent, even by consent; It has been already observed, that no tie of relationship will create an interest disqualifying as a witness, except that of husband and wife. They cannot be admitted to be witnesses either for or against each other; for, since their interests are absolutely the same, they cannot swear for the benefit of each other, any more than a man can attest for himself; (s) therefore, the wife of a prisoner cannot give evidence for him, nor for any one of several others indicted with him, where a joint offence, as a conspiracy, is charged, and an acquittal of all the others would be a ground of discharge for her husband. (t) And they cannot be witnesses against each other, by reason of the dissensions and distrusts that it would occasion, inconsistent with the happiness of married life and the peace of families; (u) and, therefore, on an indictment for bigamy, the first and true wife cannot be admitted to give evidence against her husband; (v) but, after proof of the first marriage, the second wife may be a witness. (w) And so strictly is this rule preserved, that in a civil case Lord Hardwicke would not suffer a wife to give evidence for her husband, even by consent of the other party. (x) And even after a divorce by act of parliament, the wife is not competent in an action against her husband to give evidence of any thing that happened during coverture, (y) on the ground that the confidence which subsisted between them at the time shall not be violated in consequence of any future

(o) *Ante*, Vol. I. p. 358.

(p) *Ibid.*

(q) *Ante*, Vol. I. p. 333, 334. but the inhabitants of a parish indicted for not repairing a highway, are not competent to give evidence for the defendants, *ante*, p. 608.

(r) 1 Phil. Ev. 119.

(s) Gilb. Ev. 119. 2 Hawk. P. C. c. 48. s. 70.

(t) *Ante*, p. 570. So in the case of an assault, where the cases of the co-defendants cannot be separated, Rex v. Frederick, 2 Stra. 1095.

(u) Gilb. Ev. 119. 2 Hawk. P. C. c. 48. s. 70. Barker v. Dixie, Cas. temp. Hardw. 264.

(v) *Ante*, Vol. I. p. 207.

(w) *Ibid.*

(x) Cas. temp. Hardw. 264.

(y) Monroe v. Twisleton, Peake Ev. Appendix. So a widow cannot be called by defendant to disclose conversations between herself and her late husband, in any action by his executors. Doker v. Hasler, 1 Ry. & M. 190. ruled by Best, C. J. But see Beveridge v. Minter, 1 Carr. & P. 364.

separation.(z) The rule however must be understood as applying to cases where the husband or wife are directly accused of a crime, and not as extending in the same degree to collateral suits or proceedings between third persons. It was, indeed, once held, in the case of *Rex v. Cliviger*,(a) that husband and wife in collateral cases are not to be permitted to give any evidence that might even tend to criminate each other; for though the evidence of the one could not be used against the other on a subsequent trial for the offence, yet it might lead to a criminal charge, and cause the other to be apprehended. And the principle of that decision would extend to prevent the one from being called to contradict the other; for the tendency of the evidence of the latter witness would be to prove the former guilty of perjury.(b) But the rule laid down in the case of *Rex v. Cliviger*, was much discussed in a recent case, *Rex v. All Saints, Worcester*,(c) in which the Court of King's Bench was of opinion, that it had been expressed in terms too large and general; and held, that where the evidence of the wife did not directly criminate the husband, (as in a proceeding relating to other matters, and not to any criminal charge against him,) and never could be used against him, nor could he ever be affected by the judgment of the Court founded upon such evidence, she was a competent witness.(d)

Collateral cases.

And the reasoning upon which this decision is founded is equally strong to shew, that one may be called as a witness to disprove what has been stated by the other, and that either the party who has called the one, or the opposing party, may call the other for the purpose of contradicting.(e) The declarations of the husband or wife are subject to the same rule as their evidence.(f)

They may be called to contradict each other.

Their declarations.

Upon an indictment for forcible abduction and marriage of a woman, she may be a witness for the crown,(g) or the prisoner;(h) but this is rather a case which does not fall within the general rule, than an exception to it; for she is not legally his wife, a contract obtained by force having no obligation in law.(i) Indeed, if the actual marriage is valid, (as where the woman after abduction consents to the marriage voluntarily, and not induced by any precedent menace,) or if the marriage has been ratified by subsequent voluntary cohabitation, it has been said she is not competent for or against the prisoner.(j) But there are very considerable authorities to the contrary.(k) And in a late case tried before Mr. Baron Hullock, at Lancaster, Spring C. 1827, *Rex v. Wakefield and Others*, where the defendants were indicted for a misdemeanor in conspiring to carry away a young lady, under the age of sixteen, from the custody appointed by her father, and to cause her

Exceptions.

Abduction.

Wakefield's case.

(z) By Lord Ellenborough, in *Aveson v. Kinnaird*, 6 East. 192.

(a) 2 T. R. 263.

(b) 2 T. R. 268.

(c) 1 Phil. Ev. 74.

(d) Although perhaps she would not have been *compellable* to give evidence tending to criminate her husband, 1 Phil. Ev. 75.

(e) *Ibid.*

(f) 1 Phil. Ev. 76.

(g) Gilb. Ev. 120. 1 Hale P. C. 301, 302. 2 Hawk. c. 46. s. 78.

(h) *Rex v. Perry*, at Bristol, 1794, cited by Abbott, C. J., in *Rex v. Serjeant*, 1 Ry. & Mood. N. P. C. 354.

(i) Gilb. Ev. 120. 1 Hale P. C. 302. Bull. N. P. 286.

(j) 1 Hale P. C. 302. 1 Phil. Ev. 78. Stark. Ev. Pt. IV. p. 711.

(k) 4 Blac. Com. 209. 1 East. P. C. c. 11. s. 5. *Ante*, vol. 1. 577.

to marry one of the defendants; and, in another count, for conspiring to take her away by force, being an heiress, and to marry her to one of the defendants; the learned Baron was of opinion that, even assuming the young lady to be at the time of the trial the lawful wife of one of the defendants, she was a competent witness for the prosecution, although there was no evidence to support that part of the indictment which charged force. (l)

Indictment for personal violence.

The wife is also admitted as a witness against her husband, *ex necessitate*, in a prosecution of him for offences against her person. (m) So her dying declarations are admissible against him in the case of murder. (n) In an indictment of William Whitehouse at Stafford, upon Lord Ellenborough's act, for shooting at his wife, she was admitted as a witness for the prosecution by Mr. Baron Garrow, after consulting Holroyd, J., upon the ground of the necessity of the case; and Mr. J. Holroyd sent Mr. B. Garrow the case of *Rex v. Jagger*, *Yorkshire Assizes, 1797*, where the husband had attempted to poison his wife with a cake in which arsenic was introduced, and the wife was admitted to prove the fact of the cake having been given her by her husband; and Mr. J. Rooke afterwards delivered the opinion of the twelve Judges that the evidence had been rightly admitted. Mr. J. Holroyd, however, said, he thought the wife could only be admitted to prove facts which could not be proved by any other witness. So on an indictment against a man for beating his wife, she was held competent. (o) And the wife is always permitted to swear the peace against her husband. (p) And her affidavit has been permitted to be read on an application to the Court of King's Bench for an information against the husband for an attempt to take her away by force after articles of separation; and it would be strange to permit her to be a witness to ground a prosecution, and not afterwards to be a witness at the trial. (q) And it seems to be now settled, that in all cases of personal injuries committed by the husband and wife against each other, the injured party is an admissible witness against the other. (r)

Not competent in cases where there is no personal injury.

But this rule seems to be confined to cases where the charge affects the liberty or the person of the wife. Thus it has been decided, that in an indictment for a conspiracy in procuring a lady, then a ward in Chancery, to marry, the wife was not a good witness for one of the co-defendants, if her evidence might enure to the acquittal of her husband; (s) and since she could not be admitted in favour of her husband, it follows necessarily that she could not be a witness against him. (t) So on an indictment against the

(l) See the trial, published by Murray, p. 257.

(m) Lord Audley's case, 1 St. Tr. 393. This case has been denied to be law, but is now established by the highest authorities. 1 Hale P. C. 301. 2 Hawk. P. C. c. 46. s. 77. Bull. N. P. 287. *Rex v. Serjeant*, 1 Ry. & Mood. 354.

(n) Woodcock's case, 1 Leach 500. John's case, *ibid.* 504. n. (a).

(o) By Lord Raymond on the authority of Lord Audley's case, *Rex*

v. Azire, 1 Stra. 633. Bull. N. P. 287.

(p) Bull. N. P. 287.

(q) Lady Lawley's case, *ibid.*

(r) 1 East. P. C. c. 11. s. 5. p. 455.

In the Wakefields' case, p. 257, Hulloock, B., said, "I take it, it is quite clear now, that a wife is a competent witness against her husband in respect of any charge which affects her liberty and person."

(s) *Rex v. Locker*, 5 Esp. 107.

(t) 1 Ry. & Mood. 354.

wife of W. S. and others, for a conspiracy in procuring W. S. to marry, Abbott, C. J., refused to admit W. S. as a witness in support of the prosecution.^(u)

In the case of high treason it has been said, that a wife shall be admitted against her husband, because the tie of allegiance is more obligatory than any other :^(v) but there are high authorities to the contrary.^(w)

High treason.

Whether a woman who has cohabited with a man as his wife, but who is ready to swear she is not married to him, will be allowed to give evidence on the part of the man, has been considered a doubtful question.^(x) On a trial for forgery, Lord Kenyon refused to admit a woman as witness for the prisoner, whom in the course of the trial he had frequently alluded to as his wife, but afterwards, on hearing an objection taken to her competency, denied that they were in fact married.^(y)

Competency of a woman living as a wife.

In the case of *Rex v. Perry*, Lord Chief Justice Gibbs stated, that he could see no distinction between admitting a wife for and against her husband. "The *King v. Perry*," said Lord Chief Justice Abbott, in *Rex v. Serjeant*,^(z) "was much talked about at the time, and Chief Justice Gibbs expressed his surprise that any doubt should have been entertained, that a wife was in all cases a competent witness for her husband, when admissible against him."

A wife competent against is so for her husband.

Anciently the rule was, that if there were any objection to the competency of a witness, he should be examined on the *voire dire*,^(a) and it was too late after he was sworn in chief.^(b) But for the convenience of the Court, and the furtherance of justice, (as the incompetency may not at first be suspected,) the rule is now so far relaxed, that if it is discovered at any part of the trial, that a witness is incompetent, his evidence will be struck out.^(c) With

Objections to competency; when to be taken;

^(u) *Rex v. Serjeant*, 1 Ry. & Mood. 352. But it is not necessary, it should seem, that there should be force employed, in order to make the husband or wife competent. In the case of the Wakefields', before mentioned, for abduction, Hullock, B., was of that opinion, and he mentioned that he had seen a report of the case of *Rex v. Perry*, tried before Gibbs, C. J., as recorder of Bristol, where the wife was held competent, and that no force was used in the abduction in that case.

^(v) Bull. N. P. 286. Gilb. Ev. 120.

^(w) 1 Hale P. C. 301. 1 Brown. 47.

^(x) *Campbell v. Twemlow*, 1 Price 81. A case not yet reported has been recently decided in the Common Pleas, in the affirmative.

^(y) *Per Richards*, B., 1 Price 83.

^(z) 1 Ry. & Mood. 354.

^(a) The *voire dire* is, when it is prayed upon a trial at law, that a witness may (previously to his giving evidence in the cause) be sworn to speak the truth, (in old French *voire*

dire.) whether he shall lose or get by the matter in controversy. Blount's Law Dictionary.

^(b) *Turner v. Pearte*, 1 T. R. 719.

^(c) *Turner v. Pearte*, 1 T. R. 720. *Howell v. Lock*, 2 Campb. 15. *Stone v. Blackburn*, 1 Esp. 37. *Perigal v. Nicholson*, Wightw. 64. But where upon a trial for high treason it appeared, after a witness had been examined for the Crown, without objection on the part of the prisoner, that he had been mis-described in the list of witnesses, which is required by the statute 7 Ann. c. 21. s. 14., to be given to the prisoner previous to his trial, the Court would not permit the evidence of the witness to be struck out; but said, the objection ought to have been taken in the first instance; otherwise, a party might take the chance of getting evidence which he liked, or if he disliked the testimony, he might then get rid of it on the ground of misdescription. *Rex v. Watson*, 2 Stark. N. P. C. 158. And upon this ground, Mr. Starkie

respect, however, to the power of questioning a witness for the purpose of discovering his incompetency, there is still a material difference, which will presently be pointed out, between an examination on the *voire dire*, and one after the witness has been sworn in chief.

how to be
supported;

The party against whom a witness is called, may examine him respecting his interest on the *voire dire*, or may call another witness, and produce other evidence in support of the objection. (d) The old rule is said to have been, (e) that if the witness were examined by the opposite party as to the fact of the objection, and denied it upon his oath, the party would not be at liberty to call afterwards another witness to prove it, in order to repel him from giving evidence, unless the other side acquiesced. But the modern and more convenient practice seems to be, that if the fact of incompetency is satisfactorily proved, the witness will be incompetent, although he may have ventured to deny it on the *voire dire*. And if the opposite party raise the objection of interest by independent evidence, and without putting a question to the witness, then the party who has called him cannot be allowed to put a question to him in order to repel the objection. (f)

how repelled.

Mode of examination on
voire dire.

An examination on the *voire dire* is allowed to be conducted without strict regard to the general rule of evidence, which requires the best possible proof of a fact, and admits no other. Thus a witness may be examined as to the contents of a written document without a notice to produce; (g) for the party objecting could not know previously that the witness would be called, and consequently might not be prepared with the best evidence to establish his objection. (h) And the same relaxation is allowed in removing an objection of incompetency as in raising it. Thus, where in an action brought by a chartered company, a witness for the plaintiffs admitted, on the *voire dire*, that he had been a freeman of the company, but added that he was then disfranchised, Lord Kenyon ruled, that it was not necessary to prove the disfranchisement by the regular entry in the company's books, and that the witness was competent. (i) So where a witness was objected to as next of kin in an action by an administrator, but

expresses his opinion, that a party who is cognizant of the interest of the witness at the time he is called, is bound to make his objection in the first instance. Ev. Pt. IV. p. 757.

(d) *Per* Hullock, B., Wakefield's case, p. 157.

(e) By Lord Hardwicke in Lord Lovat's case, 9 St. Tr. 647. See also the observations of Parker, C. J., in *Rex v. Muscot*, 10 Mod. 193., in which case it was asserted, but overruled, that in criminal cases there could be no examination on the *voire dire*.

(f) 1 Phil. Ev. 123.

(g) *Howell v. Locke*, 2 Campb. 15.

(h) But if the witness produces the instrument on which the objection to his competency rests, it ought to be

read. By Abbott, C. J., *Butler v. Carver*, 2 Stark. 434.

(i) *Butcher's Company v. Jones*, 1 Esp. 162. See also *Botham v. Swingler*, 1 Esp. 164. S.C. *Peake N.P.C.* 219. where the witness was allowed to remove an objection of interest raised on the *voire dire* by his own statement that he had become a bankrupt, and his estate had been assigned. See also *Rex v. Gisburn*, 15 East. 57. So where a bankrupt called as a witness stated on the *voire dire* that he had obtained his certificate and released his assignees, Park, J., held him competent, without production of the release. *Carlisle v. Eady*, 1 Carr. & P. 234. See also *Bunter v. Warre*, 1 B. & C. 689.

on re-examination answered that he had released all his interest, this was held by Lord Ellenborough to remove the objection. *(k)*

But it is only on the *voire dire* that the general rules of evidence are thus relaxed, for although objections to the competency of a witness may now be made at any stage of the trial, yet they are not to be attended with the privileges of an examination upon the *voire dire*. Thus a witness cannot be cross-examined, for the purpose of shewing him incompetent, as to what interest he takes under a will, for the will itself should be produced. *(l)* So where a party, who calls a witness, attempts to remove the objection by other independent proof, and not on the *voire dire*, he will then be subject to all the general rules of evidence. Thus where an objection, on the ground of interest, had been raised by the defendant to a witness of the plaintiff, who called another to prove that the former witness had been released, it was held that he could not be allowed to speak of the contents of the release, but the release itself, if not lost or destroyed, must be produced. *(m)* So where the objection is not raised on the *voire dire*, but appears in evidence in any other manner, the other party in answering it is bound by the usual rules of evidence. *(n)*

It is no exception against a person giving evidence for or against a prisoner, that he is one of the judges or jurors who is to try him. *(o)* And in the case of Hacker, two of the persons in the commission for the trial, came off from the bench, and were sworn, and gave evidence, and did go up to the bench again during his trial. *(p)*

Judge or juror competent.

SECTION II.

Of Privileged Communications, and other Matters which a Witness may not Disclose.

A witness when free from all the preceding objections to his competency, is to be sworn to speak the truth, the *whole* truth, and nothing but the truth. But this form of oath, absolute as it seems, must be taken with an implied reservation, that the witness is not to disclose any facts within his knowledge, which, by the law of the land, founded on considerations of justice, and of public policy, he is forbidden to make known. Of such a nature are professional communications between a client and his attorney, solicitor, or counsel, and matters connected with the government of the country. *(q)*

Privileged communications.

(k) Ingram v. Dade, MS. 1 Phil. Ev. 124.

(l) Howell v. Lock, 2 Campb. 14.

(m) Corking v. Jarrard, 1 Campb. 37.

(n) Botham v. Swingler, 1 Esp. N. P. C. 165, by Lord Kenyon.

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(o) 2 Hawk. P. C. c. 46. s. 83.

(p) Ibid.

(q) It seems, however, to have once been thought necessary to vary the form of the oath on an occasion of this sort. In the case of Spark v. Middleton, 12 Vin. Abr. Ev. B. a. 4. p.

Between client
and attorney,
or counsel.

The law attaches so sacred an inviolability to communications between a client and his legal advisers, that it will neither oblige nor suffer persons so employed to reveal any facts confidentially disclosed to them at any period of time, neither after their employment has ceased by dismissal or otherwise, nor after the cause in which they were engaged is entirely concluded. (r) The privilege of not being examined on such subjects is the privilege of the client, and not of the attorney or counsel; (s) and it never ceases. "It is not sufficient," said Mr. J. Buller, (t) "to say that the cause "is at an end: the mouth of such a person is shut for ever." And it makes no difference that the client is not in any shape party to the cause before the Court. (u)

Rule confined
to legal ad-
visers.

The privilege is strictly confined to communications made to counsel, solicitors, and attorneys. (x) No other, however confidential, or whatever be the relation or employment of the party entrusted, are privileged. Therefore all other professional persons, whether physicians, surgeons, or clergymen, are bound to disclose the matters confided to them. (y) Thus where the prisoner being a Papist, had made a confession before a Protestant clergyman of the crime for which he was indicted, that confession was permitted by Buller, J., to be given in evidence on the trial, and the prisoner was convicted and executed. (z) So a steward, servant, or private friend, is bound to disclose a communication, however confidential. (a) And in a case where a clerk to the commissioners of the property-tax was required to prove the defendant to be a collector, and he objected, because he had taken an oath of office, not to disclose what he should learn as clerk concerning the property-tax, except with the consent of the commissioners, or by force of an act of parliament, it was held that he was bound to give his testimony; and that the evidence which a witness was called upon to give in a court of justice, was to be considered as an implied exception in the act. (b) An arbitrator cannot be permitted to disclose, in an action for a malicious holding to bail, what trans-

Arbitrator.

38. 1 Keb. 505, Mr. Aylott having been counsel for the defendant, desired to be excused to be sworn on the general oath as witness for the plaintiff to give the whole truth in evidence, which the Court, after some dispute, granted, and that he should only reveal such things as he either knew before he was counsel, or that came to his knowledge since by other persons; and the particulars to which he was to be sworn, were particularly proposed, viz. what he knew concerning the will in question; whether he knew any thing of his own knowledge.

(r) Lord Say and Seale's case, 10 Mod. 41. Wilson v. Rastall, 4 Term Rep. 759. in the judgment of Buller, J. Sloman v. Herne, 2 Esp. N. P. C. 695. Rex v. Withers, 2 Campb. 578. Parkhurst v. Lowten, 2 Swanst. 194, 221. Richards v. Jackson, 18 Ves. 474.

(s) 10 Mod. 40. Bull. N. P. 284. But if the client waive his privilege, the witness may be examined. Merle v. More, 1 Ry. & Mood. N. P. C. 390.

(t) 4 T. R. 759.

(u) Rex v. Withers, 2 Campb. 578.

(x) 4 T. R. 758. Rex v. Duchess of Kingston, 11 St. Tr. 246.

(y) *Ibid.*

(z) Rex v. Sparkes, cited in Du Bonne v. Levette, Peake N. P. C. 78. in which latter case Lord Kenyon said he should have paused before he admitted such evidence. But the point, that confessions to clergymen are not privileged, has been fully established by the recent decision of the twelve Judges, on a case reserved. See Gillingham's case, *post.* Chap. II. s. 1.

(a) Vaillant v. Dodemead, 2 Atk. 534. Lord Falmouth v. Moss, 11 Price 455.

(b) Lee v. Birrell, 3 Campb. 337.

pired before him upon the examination of the parties themselves, or on an inspection of the plaintiff's books, upon the principle that the parties themselves could not have been examined in the former cause, nor the plaintiff compelled to produce his books; (c) but he may be called to prove what matters were claimed before him on a reference: (d) he cannot, however, be admitted or called on to give evidence of any concessions made by one party during the reference for making his peace, and getting rid of the suit, although, as to regular admissions by the parties, there is no objection to his testimony. (e) A person who acts as an interpreter, (f) or agent, (g) between the attorney and his client, or the attorney's clerk, (h) cannot be called on to reveal a confidential communication, for they stand precisely in the same situation as the attorney himself, and are considered as his organs. So a barrister's clerk cannot be called to prove his master's retainer. (i)

Interpreter.

Agent.

Clerk.

It has been held, that a person who is consulted confidentially on the supposition of his being an attorney, when in fact he is not one, is 'compellable to answer. (2) And propositions which the attorney of one party has been professionally entrusted to make to another party, though they are not to be disclosed by the attorney himself, may yet be proved by another witness who was present when they were delivered. (a) And communications made to a person by profession an attorney, but not employed as an attorney in the particular business which is the subject of enquiry, are not privileged, though they may have been made confidentially. (b)

Person consulted as an attorney not being one.

Attorney not consulted as such.

It now remains to be considered, what sort of communications made to an attorney, solicitor, or counsel by his client are entitled to protection. A very eminent writer on the Law of Evidence (n) has laid it down, that the privilege of the client is not confined to cases only where he has employed the attorney in a suit or cause but extends to all such communications as are made by him to the attorney in his professional character and with reference to professional business. And this opinion has been confirmed by the

What sort of communications between attorney and client are privileged.

(c) *Habershon v. Troby*, 3 Esp. 38. by Lord Kenyon.

(d) *Martin v. Thornton*, 4 Esp. 181. by Lord Alvanley.

(e) *Slack v. Buchanan*, Peak. N. P. C. 6. *Westlake v. Collard*, Bull. N. P. 236. *Martin v. Thompson*, 4 Esp. 181. It is said in Bull. N. P. 284. that a trustee shall not be a witness to betray the trust; and a case is cited, *Holt v. Tyrrel*, where the defendant pleaded to debt on bond, the statute of buying and selling offices, and upon the trial, a witness was called to give an account upon what occasion the bond was given, and Lord C. J. Holt, refused to admit him, because he was privately entrusted by both parties to make the bargain, and to keep it secret. But this is contrary to the later

authorities, and may be considered to have been over-ruled by the Duchess of Kingston's case, and *Wilson v. Rastall*, *ubi supra*.

(f) *Du Bonne v. Levette*, Peake N. P. C. 78.

(g) *Parkins v. Hawkshaw*, 2 Stark. 239.

(h) *Taylor v. Forster*, 2 Carr & P. 195.—See *Webb v. Smith*, 2 Carr & P. 337.

(i) *Foote v. Hayne*, 1 Ry. & Mood. N. P. C. 165.

(z) *Fountain v. Young*, 6 Esp. 113.

(a) *Gainsford v. Grammar*, 2 Campb. 10.

(b) *Wilson v. Rastall*, 4 T. R. 753. 760. and see *post*. p. 614.

(n) *Phillipps on Evidence*, p. 134.

court of Common Pleas in the case of *Cromack v. Heathcote*, (c) where it was held that an attorney to whom an application had been made to draw an assignment of goods which he declined to do, could not be allowed to disclose that circumstance, a question having arisen whether an assignment, subsequently drawn by another attorney, was fraudulent. And in that case a very learned person (d) said, that if an attorney were to be consulted on the title to an estate, he would not be at liberty to disclose any information thus communicated to him to the prejudice of his client. And Sir J. Leach, Vice-Chancellor, in *Walker v. Wildman*, (e) considered the protection to extend to every communication made by the client to his counsel, or attorney, or solicitor, for professional purposes. (f) But Lord Tenterden has several times expressed both before and since the case of *Cromack v. Heathcote*, at nisi prius, a contrary opinion. (g) In *Williams v. Mundie* his Lordship said, "The rule I have invariably laid down is, that "what is communicated for the purpose of bringing an action or "suit, or relating to a cause or suit existing at the time of the "communication, is confidential and privileged; but what an attorney learns otherwise than for the purpose of a cause or suit, "I think he is bound to communicate." (h)

Attorney not allowed to produce documents, &c. deposited with him by his client.

An attorney will not be allowed to produce a deed which has been deposited with him confidentially in his professional character: and if the deed has been obtained out of his hands, for the purpose of being produced in evidence by another witness, it cannot be received. Thus a copy of a deed which had been obtained from one who had formerly been entrusted with the original in his professional character as an attorney, is not good secondary evidence against his client. (i) So on a prosecution for the forgery of a promissory note, an attorney who had acquired possession of the note in his professional character from the prisoner, was not compelled or allowed to produce it, although subpoenaed so to do, and although he was not employed professionally for the prisoner at the trial, but was originally consulted about the note, for the purpose of suing the party upon it whose name was charged

(c) 2 Brod. & Bing. 4.

(d) Richardson, J.

(e) 6 Madd. 47.

(f) And from the cases of *Brard v. Ackerman*, 5 Esp. 120. and *Robson v. Kemp*, 5 Esp. 52., it appears that Lord Ellenborough was of the same opinion.

(g) *Wadsworth v. Hamshaw*, 2 Brod. & Bing. 5. n. (a). Manning's Dig. 374. *Williams v. Mundie*, 1 Ry. & Mood. N. P. C. 34.

(h) His Lordship further said, "this rule was adopted by the court of King's Bench, on a motion for a new trial in a case that had been tried on the Midland Circuit, in which Serjt. Adair was counsel.— This is not the first time the ques-

tion has arisen here, and it is one to which I have given much consideration." See however his Lordship's judgment in the Easter Term following, in the case of *Bramwell v. Lucas*, 2 Barn. & Cress. 749.

(i) *Fisher v. Heming*, MS. 1 Phil. Ev. 132. *cor.* Bayley, J., who said, "the attorney could not give parol evidence of the contents of the deed, so neither can he furnish a copy. He ought not to have communicated to others what was deposited with him in confidence, whether it was writing or verbal communication. It is the privilege of his client and continues from first to last." See also *Copeland v. Watts*, 1 Stark. N. P. C. 93.

to be forged. (j) So in the case of *Rex v. Dixon* (k) it was held by Lord Mansfield, and the rest of the court, that an attorney, who had been served with a *subpœna duces tecum* out of the crown-office to produce certain vouchers which his client, a Mr. Peach, had exhibited and relied upon, before a Master in Chancery, and which subpœna had been served on the attorney in order to found a prosecution for forgery against his client, was not bound to produce these required vouchers. (l) A barrister cannot be called to prove what was stated by him on a motion before the court. (m) And the Attorney-General, if questioned as to the reasons for filing an *ex officio* information, may refuse to answer. (n)

Counsel.

Attorney-general.

As to what facts an attorney may be examined.

An attorney may be examined like any other witness to a fact which he knew before his retainer, that is before he was addressed in his professional character, (o) or where he has made himself a party to the transaction, (p) or where he is questioned to a collateral fact which he might have known without being intrusted as the attorney in the cause. (q) Thus he may prove his client's handwriting though the knowledge was obtained from witnessing his execution of the bail bond in the action. (r) And he may be called to prove his client's identity. (s) And if he is a subscribing witness to a deed he may be examined concerning the execution. (t) Or if the question be about a rasure in a deed or will, he may be examined whether he had ever seen such deed or will in other plight, for that is a fact of his own knowledge; but he ought not to be permitted to discover any confessions which his client may have made to him on such head. (u) So if the attorney were present when his client was sworn to an answer in Chancery, upon an indictment for perjury, he would be a witness to prove the fact of taking the oath, for it is a fact in his own knowledge, and no matter of secrecy committed to him by his

(j) *Rex v. Smith*, *cor. Holroyd*, J. MS. 1 Phil. Ev. 132.

(k) 3 Burr. 1687, cited by Lord Ellenborough in *Amey v. Long*, 9 East. 485.

(l) See also *Laing v. Barclay*, 3 Stark. 38., where it was held by Abbott, C. J., that a solicitor under a commission of bankrupt was not bound to produce the proceedings under the commission in a collateral action, where the production might tend to the detriment of his clients, see also *Harris v. Hill*, 3 Stark. N. P. C. 140. S. C. 1 Dowl. & Ry. N. P. C. 17. *Rex v. Upper Boddington*, 8 Dowl. & Ry. 726.

(m) *Curry v. Walter*, 1 Esp. 456. *cor. Eyre*, C. J., who said it was at the option of counsel whether he would give his testimony or not. A court of equity will compel the production of a case submitted to counsel, but not his opinion on it, *Preston v. Carr*, 1 Younge & Jervis 175.

(n) *Rex v. Horne*, 11 St. Tr. 283.

(o) *Cutts v. Pickering*, 1 Vent. 197. Lord Say and Seale's case, 10 Mod. 40. 1 Phil. Ev. 136.

(p) *Duffin v. Smith*, Peake N. P. C. 108. *Robson v. Kemp*, 5 Esp. 52.

(q) *Bull. N. P. 284*. 1 Phil. Ev. 136.

(r) *Hurd v. Moring*, 1 Carr & P. 372., ruled by Abbott, C. J.

(s) *Studdy v. Saunders*, 2 Dow. & Ry. 347., but see *Parkins v. Hawkshaw*, 2 Stark. N. P. C. 239.

(t) *Doe v. Andrews*, Cowp. 846. *Robson v. Kemp*, 4 Esp. 235. S. C. 5 Esp. 52. For if an attorney puts his name to an instrument as a witness, he makes himself thereby a public man, and is no longer clothed with the character of an attorney: his signature binds him to disclose what passed at the execution of the instrument, but not what took place in the concoction and preparation of the deed: by Lord Ellenborough, 5 Esp. 54.

(u) *Bull. N. P. 284*.

client. (*v*) So the attorney of one of the parties may be examined as to the contents of a written notice which had been received by him in the course of a cause, requiring him to produce papers; (*w*) for the privilege only extends to confidential communications from the client, and not to those from collateral quarters although made to him in consequence of his character as an attorney. (*x*) So an attorney who prepares deeds which are granted on an usurious consideration, may be called as a witness to prove the usury: for that does not come to his knowledge in the character of an attorney, he being as it were a party to the original transaction. (*y*) And where an action on a promissory note had been compromised by the defendant's paying part of the money and giving a warrant of attorney to confess judgment for the residue, and in the interval between the time when the warrant of attorney was given, and the time the money became due according to the defeasance thereof, the plaintiff told his attorney in the suit, that he was glad it was settled, for that he had not given consideration for the note, and he knew it was a lottery transaction: it was held, that the attorney was admissible to prove this conversation in an action to recover back the money. (*z*) The communication, said Lord Kenyon, was not made by the client in confidence as instructions for conducting his cause; on the contrary, the purpose in view had been already obtained, and what was said was in exultation to his attorney for having before deceived him as well as his adversary, and for having obtained his suit.

Communications between attorney and client not privileged if not professional.

The privilege is also confined to communications to the attorney in his character of attorney; and, therefore, a communication made to him, or question asked him by his client, not for the purpose of getting his *legal* advice, but to obtain information as to a matter of fact, is not privileged. As when a client asked his attorney whether he could safely attend a meeting of his creditors, called on the attorney's suggestions, and the attorney advised him to remain at his office for the present, and he accordingly remained there two hours to avoid being arrested; it was held that the attorney might prove all these facts, in order to shew an act of bankruptcy, in an action by his client's assignees. (*a*) So in the case of *Annesley v. Lord Anglesea*, (*b*) it was held, that a conversation which passed between Lord A. and his attorney twenty years ago, respecting the prosecution of the plaintiff for murder, was not privileged, since it was not matter of professional confidence.

(*v*) Bull. N. P. 284, 285. But he is not bound to speak to the particulars of a bill of exchange intrusted to him by his client; for the existence of such a bill is not a mere fact but consists of circumstances which he came to be acquainted with from the delivery of the bill to him by his client, *Brard v. Ackerman*, by Lord Ellenborough, 5 Esp. 120.

(*w*) *Spencely v. Schulenberg*, 7 East. 357.

(*x*) So (*semble*) a letter written by an attorney to his client, and produced with the client's signature endor-

ed upon it, is evidence against the client, *Assignees of Meyer v. Sefton*, 2 Stark. N. P. C. 274. So an admission of a debt made by an attorney to the adverse party, by direction of his client, is not privileged, *Turner v. Railton*, 2 Esp. 474.

(*y*) *Duffin v. Smith*, Peake N. P. C. 108. by Lord Kenyon.

(*z*) *Cobden v. Kendrick*, 4 T. R. 432.

(*a*) *Bramwell v. Lucas*, 2 B. & C. 745.

(*b*) 9 St. Tr. 391. before the Barons of the Exchequer in Ireland, 1743.

If an attorney or counsel be called by his own client to give evidence, he is not privileged from cross-examination on the same matter as to which he was examined in chief, although it were a confidential communication made professionally: but the cross-examination must not extend beyond that matter.(c)

Cross-examination of an attorney.

There are, besides these professional communications, a number of cases of a particular description, in which, for reasons of public policy, information is not permitted to be disclosed. Courts of justice will not permit witnesses to be asked the names of those from whom they receive information as to frauds on the revenue.(d) In all the trials for high treason of late years, the same course has been adopted: and if parties were willing to disclose the sources of their information, they would not be suffered to do it by the Judges.(e) "If the name of an informer," said Mr. Justice Buller, in Hardy's case, "were to be disclosed, no man would make a discovery, and public justice would be defeated." And this privilege not only protects the actual informer himself, but those questions which tend to the discovery of the channels by which the disclosure was made to the officers of justice, are not permitted to be asked. Thus a person who has been employed to collect secret information for the executive government, or for the service of the police, is not allowed to reveal the name of his employer, or the nature of the connexion between them;(f) or the names of any persons to whom he has communicated his information for the purpose of its being transmitted,(g) whether those persons were magistrates, or concerned in the administration of government, or were merely the channel through which information was conveyed to government.(h)

Informers.

Agent of government or police.

Upon the same ground the Attorney-General of Upper Canada was not allowed to be asked as to the nature of a communication made by him to the governor of the province.(i) So the orders given by the governor of a foreign colony to a military officer under his command, ought not to be produced.(j) So Abbott, C. J., refused to admit in evidence the report of a military court of enquiry, in an action of libel by an officer, respecting whose conduct the Court had been appointed to enquire; and his decision was confirmed on error in the Exchequer Chamber.(k) And Lord Ellenborough would not permit the contents of a letter, written by an agent of government to Lord Liverpool, then secretary of state, or his Lordship's answer, to be produced as evidence.(l) In Watson's case, an officer of the Tower of London

Official communications.

(c) *Vaillant v. Dodemead*, 2 Atk. 524.

(d) By Dallas, C. J., in *Home v. Bentinck*, 2 Brod. & Bing. 162. Hardy's case, 24 How. St. Tr. 753. But where a person officiously interferes to inform any of the constituted authorities of alleged abuses, the communication is not privileged; and if untrue, may be considered malicious and actionable, *Robinson v. May*, 3 Smith 3.

(e) 2 Brod. & Bing. 162.

(f) 24 How. St. Tr. 753.

(g) 24 How. St. Tr. 811.

(h) By Abbott, J., in *Rex v. Watson*, 2 Stark. 136. Stone's case, as cited by Lord Ellenborough, *ibid*.

(i) *Wyatt v. Gore*, Holt. N. P. C. 299., ruled by Gibbs, C. J.

(j) *Cooke v. Maxwell*, 2 Stark. N. P. C. 185.

(k) *Home v. Lord F. C. Bentinck*, 2 Brod. & Bing. 130.

(l) *Anderson v. Hamilton*, (n.) 2 Brod. & Bing. 156.

Questions
contrary to
state policy.

Transactions
of privy coun-
cil.

was not allowed to prove that a plan of the Tower, produced by the defendant, was accurate. *(m)*

In the case of the Seven Bishops, the clerk of the privy council was compelled to state what passed in the council chamber, and even what was said by the King himself, although the counsel for the crown objected to it. *(n)* And the same evidence was allowed in Lord Strafford's case. *(o)* But in Layer's case, *(p)* it seems to have been considered that the minutes taken before the privy council were not to be divulged; and the two other cases above cited were decided under the strong feelings which the circumstances of the times had produced, and the latter in particular has been considered as a very unwarrantable departure from law and justice. *(q)*

Grand Jury.

A clerk attending upon a grand jury, shall not be compelled to reveal that which was given them in evidence, *(e)* and the jurors themselves are bound by oath not to disclose what passes before them: but it has been held that a grand jurymen may be called to prove who was the prosecutor of an indictment; for it is a question of fact, the disclosure of which does not infringe on his oath. *(f)*

House of
Commons.

A witness was not allowed by Lord Ellenborough to be asked as to the expressions or arguments which a member of the House of Commons had made use of in the House; for, said his Lordship, it would be a breach of duty in the witness (who was a member himself), and a breach of his oath, to reveal the councils of the nation; *(g)* but as to the fact of the plaintiff's having taken part in the debate, he was bound to answer. *(h)*

SECTION III.

How Witnesses ought to be examined, and what Questions they may be asked, and compelled to answer.

Before a witness is examined, he must be sworn in open Court. The proper method of administering the oath, and the objections which may be made previous to the administration of it, have already been considered. *(a)* And the proper time and mode of objecting to the competency of a witness, whether on the *voire dire*, or at a later stage of the trial, have been discussed in the first section of this chapter. *(b)*

Examination
in chief.

After a witness has been regularly sworn, the party who has

(m) 2 Stark. 148.

(n) 4 St. Tr. 346.

(o) 1 St. Tr. 723.

(p) 6 St. Tr. 288.

(q) 1 Phil. Ev. 274.

(e) 12 Vin. Abr. Evidence B. a. 5.

(f) Sykes v. Dunbar, Selw. N. P.

1059., *per* Kenyon, C. J.

(g) Plunkett v. Cobbett, 5 Esp. 137. 29 How. St. Tr. 71, 72.

(h) 5 Esp. 137.

(a) *Ante*, sect. 1. p. 591.

(b) *Ante*, p. 607.

called him proceeds to examine him in chief; respecting which examination the most important rule is, that leading questions must not be put to the witness; that is, questions which, being material to any of the points of the issue, plainly suggest to him the answer he is expected to make. But this objection is not allowed to be applied if the question is merely introductory, and one which if answered by *Yes* or *No* would not be conclusive on any of the points of the issue; for it is necessary to a certain extent to lead the mind of the witness to the subject of the enquiry. (c)

Leading questions.

Thus in an action of *assumpsit* against two, in order to prove that the defendants were partners, the first witness was asked, whether one of them had interfered in the business of the other. And upon this question being objected to as leading, Lord Ellenborough ruled, that it might properly be asked. (d) An affirmative answer to this question would not have been conclusive, for the defendant might have interfered, without making himself a partner. So where the witness called to prove the partnership of the plaintiffs, could not recollect the names of the component members of the firm, so as to repeat them without suggestion, but said he might possibly recognize them, if suggested to him, Lord Ellenborough, (alluding to a case tried before Lord Mansfield, in which the witness had been allowed to read a written list of names,) ruled, that there was no objection to asking the witness whether certain specified persons were members of the firm. (e) Upon the trial of *De Berenger* and others, before Lord Ellenborough at Guildhall, for a conspiracy, it became necessary for a witness (a post-boy, who had been employed to drive one of the actors in the fraud), to identify *De Berenger* with that person; and Lord Ellenborough held, that for this purpose, the counsel for the prosecution might point out *De Berenger* to the witness, and ask him whether he was the person. (f) So in *Rex v. Watson and Others*, (g) tried at bar, upon its becoming necessary to identify three of the prisoners, it was objected, that the attention of the witness was too directly pointed to them; but the Court held, that the counsel for the prosecution might ask in the most direct terms, whether any of the prisoners was the person meant and described by the witness. So where the plaintiff's son, being called as a witness for his father, was cross-examined as to the contents of a letter received by him from the plaintiff, which he swore had been lost, and mentioned some particular expressions as part of its contents; and witnesses were called on the part of the defendant to speak to the contents of the same letter; Lord Ellenborough ruled that the defendant's counsel might ask one of them, who had first exhausted his memory by stating all he recollected of the letter, whether it contained the particular expressions sworn to by the plaintiff's son; for otherwise, said his Lordship, it would be impossible ever to come to a direct contradiction. (h)

When, upon cross-examination; a witness has denied having

(c) *Nicholls v. Dowding and Kemp*,
1 Stark. N. P. C. c. 81.

(d) 1 Stark. N. P. C. 81.

(e) *Acerro v. Petroni*, 1 Stark. N. P.
C. 100.

(f) 1 Stark. Ev. p. 125.

(g) 2 Stark. N. P. C. 128.

(h) *Courteen v. Touse*, 1 Campb.

Leading in chief to contradict former witness of adverse party.

used particular expressions, or having made a particular statement to A. B., who is afterwards called on the part of the adverse party, for the purpose of contradicting the first witness, by proving that he actually did speak the words, or make the statement to him, it is very usual in practice for the counsel of the adverse party, in examining A. B. in chief as his own witness, to ask him, in the first instance, whether the former witness, in conversing with him, said so and so, or made such and such a statement. And accordingly, where a witness of the plaintiff's, in cross-examination had been asked as to some expressions he had used, for the purpose of laying a foundation for contradicting him, and he had denied having used them, Abbott, C. J., held, that the defendant's counsel, having called a person to prove that the former witness had used such expressions, was entitled to read to his own witness the particular words from his brief.⁽ⁱ⁾ However, a very able writer^(j) has with great force endeavoured to shew, that leading questions under such circumstances are irregular.

Leading an adverse or unwilling witness.

When a witness, by his conduct during his examination, shews himself decidedly adverse to the party who has called him, or unwilling to give evidence, it is in the discretion of the Judge to allow the examination to assume the form of a cross-examination; and if a witness stands in a situation which of necessity makes him adverse to the party calling him, it has been held that the counsel may, as matter of right, cross-examine him. (k)

Cross-examination.

After the examination in chief is closed, the other party is at liberty to proceed to cross-examination, without regard generally to the rule restricting examinations in chief in respect to leading questions.

Leading questions.

If the witness betrays a zeal against the cross-examining party, or shews an unwillingness to speak fairly and impartially, he cannot, it should seem, be led too much.^(l) But where the witness on the other hand discovers an anxiety to serve the cross-examining party, although the Courts do not usually exclude the counsel, on cross-examination, from putting leading questions, it is obvious that evidence so obtained is very unsatisfactory, and is open to much observation.^(m) And, although the witness may be led on cross-examination to bring him directly to the point as to the answer, yet if he has betrayed an inclination to lean, and be favourable to the cross-examining party, it is not allowable to go the length of putting into the witness's mouth the very words which he is to echo back.⁽ⁿ⁾

A witness cannot be asked, upon cross-examination, questions

(i) *Edmonds v. Walter*, 3 Stark. N. P. C. 7.

(j) 1 Phil. Ev. 256.

(k) By Best, C. J., in *Clarke v. Saffery*, Ry. & Mood. N. P. C. 126. In *Basten v. Carew*, *ibid.* 127., Abbott, C. J., allowed the cross-examination of an adverse witness, and said, "I mean to decide this, and no further—That in each particular case there must be some discretion in the presiding Judge as to the mode in which the examination shall be con-

ducted, in order best to answer the purposes of justice."

(l) 1 Phil. Ev. 261.

(m) Mr. Starkie, in his *Treatise on Evidence*, vol. 1. p. 132. mentions that he has heard Lord Tenterden express himself to this effect more than once.

(n) By Buller, J., in *Hardy's case*, 24 How. St. Tr. 755. referring to a rule laid down on the day before by Eyre, C. J., to the same effect.

which are not in any way relevant to the matters in issue; (o) neither is a question allowed to be asked, which, if answered affirmatively, would be wholly irrelevant to the issue, for the purpose of discrediting the witness if he answers in the negative, by calling other witnesses to disprove what he says; (p) but this subject will perhaps be more conveniently discussed in a subsequent section, (q) concerning the modes of impeaching the credit of a witness; (r) in which place will also be considered the obligation of a witness to answer questions tending to subject him to a criminal prosecution or degrading to his character. It is, however, proper to mention in this place how far a witness is compellable to answer a question, whereby he may subject himself to a civil action, or charge himself with a debt. Considerable doubts had been entertained upon this subject, before the stat. 46 Geo. 3. c. 37.; for the settlement of which it was thereby declared and enacted, that a witness cannot by law refuse to answer any question relevant to the matter in issue, (the answering of which has no *tendency* to expose him to a penalty or forfeiture of any nature whatsoever) by reason only, and on the sole ground that the answering such question may establish, or tend to establish, that he owes a debt, or is otherwise subject to a civil suit, either at the instance of his Majesty, or any other persons. (s) This statute, however, does not affect the right, which the parties to a suit have, of declining to give evidence for the opposite party: and, therefore, upon an appeal, a rated inhabitant of the appellants parish (being considered a party to the appeal) cannot be compelled, even since the statute, to give evidence when called upon by the respondents. (t) And the witness is still privileged from answering any question, the answer to which might subject him to a forfeiture of his estate; for the statute implies, that a witness may legally refuse to answer a question which has a tendency to expose him to a forfeiture of any nature whatsoever. (u)

Counsel upon cross-examination cannot assume that the witness has made an assertion in his examination in chief, which was not in fact made, (v) or put a question which assumes a fact not in proof. (x)

What may be asked on cross-examination.

Questions must not be irrelevant.

Obligation of witness to answer, where the answer might subject to a penalty or prosecution, or degradation.

To a civil suit.

Assumptions not allowable in cross-examination.

(o) A cross-examination as to a fact otherwise irrelevant, is not warranted by the circumstance that the adverse counsel opened it, without any attempt at proof, *Lucas v. Novosilieski*, 1 Esp. N. P. C. 296.

(p) *Post.* p. 632.

(q) Sect. 4.

(r) *Post.* p. 632.

(s) There is a distinction between the obligation of a witness, since this statute, to answer questions, though they may subject him to civil suits; and his obligation to produce writings, &c. under a *subpœna duces tecum*. For if a *subpœna duces tecum* is served, the party must bring his deeds into Court in obedience to the *subpœna*, although if he states

that they are his title deeds, no Judge will ever compel him to produce them, *Pickering v. Noyes*, 1 B. & C. 263.

(t) *Rex v. (Inhab.) Woburn*, 10 East. 395. But this decision was before stat. 54 G. 3. c. 170., which provides, that no rated inhabitant of a parish shall be deemed an incompetent witness for or against such parish.

(u) 1 Phil. Ev. 264.

(v) *Hill v. Coombe, cor. Abbott, J.*, Manning's Digest, tit. Witness, pl. 236.

(x) *Doe v. Wood, cor. Abbott, J.*, *ibid.* pl. 237. The objection was frequently taken and allowed during the proceedings in the House of Lords in the Queen's case. See printed evidence.

Cross-examination as to written instruments; for the purpose of contradiction.

It is not allowable upon cross-examination, to ask a witness as to the contents of written instruments, (y) although they are shewn to be in the possession of the opposite party, and notice has been given to the opposite party to produce them. (z) Under what circumstances a cross-examination as to the contents of a written document, for the purpose of impeaching the credit of a witness, is allowable, will be considered hereafter in the fourth section of this chapter. (a)

Cross-examination of witness called by one of several defendants alone.

Upon the trial of Kroehl, Gibson, and Koech, (b) for a conspiracy, where the three defendants defended separately, Koech alone called witnesses, and examined to a conversation between himself and Kroehl. The counsel for the prosecution was proceeding to cross-examine as to another conversation between Koech and Kroehl, when the counsel for the prisoner Kroehl objected, on the ground, that the effect might be to bring out a new case against Kroehl, although he had called no witnesses, and after the case for the Crown was finished: but Abbott, J., said, that as Koech had called witnesses, he could not prevent the cross-examination as to any conversations that might affect Koech. It might be a matter for future consideration, whether the counsel for Kroehl, after such evidence, would have a right to address the jury upon it.

Who may be cross-examined.

If a witness be called merely for the purpose of producing a written instrument, which is to be proved by another witness, he need not be sworn, and unless sworn, he is not subject to cross-examination. In *Simpson v. Smith* and another, (an action for maliciously, and without probable cause, making a charge of felony before a Justice of the peace against the plaintiff, and causing him to be apprehended, tried at *Nottingham* Sum. Ass. 1822, before Holroyd, J.) the plaintiff's counsel having called upon the Justice to produce the information taken by him, which was accordingly produced, was proceeding to prove the information by the Justice's clerk; when it was insisted by the defendant's counsel, that he should be allowed to cross-examine the Justice, who had produced the examination: but Holroyd, J., held that this could not be done, and that the plaintiff's counsel might proceed to prove the examination in the regular manner. (c) But where, upon an indictment for perjury, the attorney for the prosecution was called and sworn, and produced a copy of a declaration in an action brought by the defendant against the prosecutor, though he was not asked any question on the part of the prosecution, Abbott, C. J., held, that the defendant was entitled to cross-examine him. (d) And if a witness be called, though it be through necessity, for the purpose of the mere formal proof of a document, this makes him a witness for all purposes, and he may be cross-examined as to the whole of the case. (e) So if a witness has been called by one party, and sworn, the other may cross-examine

(y) *Sainthill v. Bound*, 4 Esp. 74.
Howell v. Lock, 2 Campb. 14.

(z) *Graham v. Dyster*, 2 Stark. N. P. C. 23. *Sidways v. Dyson*, *ibid.* 49.

(a) *Post.* p. 630, 631.

(b) 2 Stark. N. P. C. 343.

(c) 1 Phil. Ev. 260.

(d) *Rex v. Brooke*, 2 Stark. N. P. C. 472.

(e) *Morgan v. Brydges*, 2 Stark. N. P. C. 314.

him, though no question has been asked him in chief.(f) So, though the counsel for the prosecution are not bound to call every witness, whose name is on the back of the indictment, it is usual for them to do so, and if they decline, the Judge, in his discretion, may, and generally will call them, that the defendant may cross-examine them.(g)

It is reported to have been ruled by Lord Kenyon,(h) that where a witness has been examined by one party, and cross-examined by the other, and the latter has afterwards occasion to call the same witness back as part of his own case, the privilege of cross-examination continues, and leading questions may be put to him. But it has been very properly remarked,(i) that the mode of examination under such circumstances is in truth regulated, according to the disposition and temper manifested by the witness, by the discretion of the presiding Judge.(k)

Witness of one party afterwards called by the other.

The object of re-examining a witness being merely to explain the facts stated by the witness on cross-examination, he cannot be re-examined as to any facts unconnected with it; but if any material question has been omitted in the examination in chief, the practice is to suggest it to the Court, who will put it to the witness, or decline to do so, at its discretion.(l)

Re-examination.

It has already been remarked, that a witness cannot be cross-examined as to a written document, in the possession of the party who calls him;(m) and the rule is general, that a witness cannot either be examined in chief or cross-examined as to the contents of a written document, not produced; yet, in civil cases, he has sometimes been allowed to be examined as to the general result from a great number of documents, too voluminous to be read in Court.(n) So a witness may refresh his memory by means of a written instrument, which cannot itself be legally produced in evidence. Thus, where a receipt for money has been given on unstamped paper, it may be used by the witness, who saw it given, to refresh his memory.(o) And where a witness, who had received money and given a receipt for it which could not be read in evidence for want of a proper stamp, had become blind, the receipt was allowed by Abbott, C. J., to be read over to him in Court, (he being informed that the paper was in his handwriting) in order to refresh his memory.(p) So to prove an act of bankruptcy committed some years back, a deposition made at the time

Examination of witnesses generally, with reference to written documents.

Written instrument used to refresh memory.

(f) *Phillips v. Eamer*, 1 Esp. 356. But where, in an action by the assignees of a bankrupt, the petitioning creditor was called, for the purpose of producing the bill of exchange on which the action was founded, and sworn: Lord Ellenborough would not allow the defendant to cross-examine him, since he could not have been permitted to have given evidence for the plaintiff. *Reed v. James*, 1 Stark. N. P. C. 132.

(g) *Rex v. Simmonds*, 1 Carr. & P. 84.

(h) *Dickinson v. Shee*, 4 Esp. 67.

(i) 1 Stark. Ev. 132.

(k) See also the observation of Abbott, C. J., in *Basten v. Carew*, Ry. & Mood. N. P. C. 127.

(l) See *post*. p. 633. sect. 4. as to re-examining a witness, who has been cross-examined respecting his former statements and declarations.

(m) *Ante*, p. 620.

(n) *Meyer v. Sefton*, 2 Stark. N. P. C. 276. *Roberts v. Daxon*, Peake N. P. C. 83.

(o) *Rambert v. Cohen*, 4 Esp. 213.

(p) *Catt v. Howard*, 3 Stark. N. P. C. 3. See also *Jacob v. Lindsay*, 1 East. 460.

by an aged witness, was allowed by Lord Kenyon to be read to him for the same purpose.(q)

Rule as to memorandum to refresh memory.

The general rule is, that a witness, to assist his memory, may use a written entry, if it were made by himself shortly after the occurrence of the fact to which it relates: but if he cannot speak to the fact from recollection, any further than as finding it entered in a book or paper, such book or paper ought to be produced, and if not evidence, the testimony of the witness amounts to nothing.(s) Although in general, the entries ought to have been made by the witness himself, yet if another wrote them, and the witness regularly examined them from time to time, soon after they were written, and while the facts stated in them were fresh in his recollection, he may refresh his memory by referring to them, as if he had written them with his own hand.(t) But a witness will not be allowed to refresh his memory with a *copy* of a paper made by himself six months after he wrote the original, though the original itself is proved to be so covered with figures as to be unintelligible.(u) When a witness refreshes his memory from memorandums, it is always usual, and very reasonable, that the adverse counsel should have an opportunity of looking at them, when he is cross-examining the witness.(x)

The adverse party may look at the memorandum.

Examination as to opinion.

Questions of skill and judgment.

The general rule is, that a witness must not be examined as to his opinion, for his testimony must be confined to evidence of facts: but in questions of skill and judgment, men of science or experience are allowed to give evidence of their opinion. Thus, in a civil case, in an enquiry as to an embankment choking up a harbour, an engineer has been admitted to prove, from his own experiments, what were the effects of natural causes upon that particular harbour, and on other harbours similarly situated on the same coast, and that the removal of the bank would not, in his opinion, restore the harbour.(y) So shipbuilders have been admitted to state their opinion on the sea-worthiness of a ship, from examining a survey, which had been taken by others, and at which they were not present.(z) Where the question is, whether a seal

(q) *Vaughan v. Martin*, 1 Esp. N. P. C. 440.

(s) *Doe v. Perkins*, 3 T. R. 749. *Roscoe on Ev.* 78. See *Henry v. Lee*, 2 Chit. Rep. 124.

(t) *Burrough v. Martin*, 2 Campb. 112. The entries were in a log-book.

(u) *Jones v. Stroud*, 2 Carr & P. 196.

(x) By *Eyre, C. J.*, in *Hardy's case*, 24 How. St. Tr. 824. 1 Phil. Ev. 275. *Sinclair v. Stevenson*, 1 Carr & P. 582. But if a paper is put into a witness's hands merely to prove a handwriting, the other side have no right to see it. *Ibid.* per *Best, C. J.* If a counsel, in cross-examination, put a paper into the witness's hand to refresh his memory, the opposite counsel has a right to look at it, without being bound to read it in evidence. And he may also ask the witness when it was written,

without being bound to read it. *Rex v. Hamsden*, 2 Carr & P. 604. by Lord Tenterden.

(y) *Folkes v. Chad*, MS. 1 Phil. Ev. 276. cited by *Buller, J.*, in *Goodtitle v. Braham*, 2 T. R. 498. So the opinion of a person conversant with the business of insurance may be asked, as to whether the communication of particular facts would have varied the terms of insurance; though not what his conduct would have been in the particular case. *Berthon v. Loughman*, 2 Stark. N. P. C. 258. *con.* *Holroyd, J.*, but see *contra Durrell v. Bederley*, Holt N. P. C. 286. by *Gibbs, C. J.*

(z) *Thornton v. Royal Exchange Assurance Company*, Peake N. P. C. 25. *Chaurand v. Angerstein*, *Ibid.* 43. *Beckwith v. Sydebotham*, 1 Campb. 117.

has been forged, seal-engravers may be called to shew the difference between a genuine impression, and that supposed to be false. (a) So in several cases where the genuineness of certain handwriting has been in question, persons skilled in the examination of handwriting, and in the detection of forgeries, as inspectors of franks, and clerks of the post-office, have been allowed to state their opinion, whether a particular writing is in a genuine or imitated character. (b) But the authority of these cases has been shaken by the case of *Gurney v. Langlands*, (c) in which an issue having been directed to satisfy the Court of King's Bench as to the forgery of a signature to a warrant of attorney, Wood, B., refused to admit the evidence of an inspector of franks at the post-office, who, having never seen the party write, was called to prove, from his knowledge of handwriting in general, that the signature in question was not a genuine signature, but an imitation. On a motion for a new trial, the Court refused to disturb the verdict, some of the Judges expressing doubts, whether the evidence was admissible, and all of them considering it, if admissible, not entitled to any weight. (d)

In criminal cases, the opinions of medical men of science are very frequently employed as evidence. A physician who has not seen the patient, may, after hearing the evidence of others, be called to prove on his oath, the general effect of the disease described by them; and its probable consequences in the particular case. (e) So in prosecutions for murder, medical men have been allowed to state their opinion, whether the wounds, described by witnesses, were likely to be the cause of death. (f) So in the case of *Rex v. Wright*, (g) who was tried for murder, and the defence was insanity, the twelve Judges were unanimous in thinking that a witness of medical skill might be asked, whether, in his judgment, such and such appearances were symptoms of insanity, and whether a long fast, followed by a draught of strong liquor, was likely to produce a paroxysm of that disorder in a person subject to it. But several of the Judges doubted whether the witness could be asked his opinion on the very point which the jury were to decide, *viz.* whether, from the other testimony given in the case, the act as to which the prisoner was charged, was, in his opinion, an act of insanity. Medical men.

(a) By Lord Mansfield in *Folkes v. Chad*, *ubi supra*. *Ante*, p. 380.

(b) *Goodtitle v. Braham*, 4 T. R. 497. *Rex v. Cator*, 4 Esp. N. P. C. 117, 145. *Stranger v. Searle*, 1 Esp. 14.

(c) 5 B. & A. 330. *Ante*, p. 380.

(d) See also the case of *Cary v. Pitt, Peake Ev. App. 84.* in which Lord Kenyon refused to receive the evidence of an inspector of franks at the post-office, as to whether he thought the defendant's acceptance a genuine handwriting, or otherwise; and his Lordship said, that though such evidence was received in *Revett v. Braham*, he had in his charge to the jury,

laid no stress upon it. Mr. Baron Wood, in his report in the case of *Gurney v. Langlands*, observed, "Opinions of skilful engineers, mariners, &c. may be given in evidence on matters depending upon skill, *viz.* as to what effect an embankment in a particular situation, may have upon a harbour, or whether a ship has been navigated skilfully: because in such cases, the witness has a knowledge of the alleged cause, and his skill enables him to judge and form a belief to that effect."

(e) *Peake Ev.* 190.

(f) 1 Phil. Ev. 275.

(g) *Russ. & Ry. C. C. R.* 456.

Opinion as to
law of another
country.

Separate exa-
mination of
witnesses.

Counsel may
not cross-exa-
mine if de-
fendant ad-
dresses the
jury.

The Judge
may examine
witnesses after
case closed
and objection
taken.

A person of experience in the profession of the law of another country may state his opinion, what, according to the law of that country, would be the legal effect of the facts previously spoken to by the witnesses, taking the facts to be accurate.(v)

It is usual for the Court, at the instance of either party, in criminal as well as civil cases, to make an order that the witnesses, intended to be examined on either side, shall remain out of court during the examination of the other witnesses;(w) and if any person be present contrary to that order, he cannot, on any account, be permitted to be examined,(x) although he be the attorney in the cause.(y) But in a late case,(z) *Littledale, J.*, said, that an attorney was not within the rule, and might remain, and still be admissible as a witness, his assistance being in most cases absolutely necessary to the proper conduct of a cause.

Upon the trial of a misdemeanor, the defendant is not entitled to the assistance of counsel to cross-examine witnesses, when he reserves to himself the right of addressing the jury; but counsel may argue for him any points of law that arise, and may suggest the questions to be put to the jury.(a)

Though the counsel for the prosecution has closed his case, and the counsel for the prisoner has taken an objection as to a defect in the evidence, the Judge is at liberty to make any further enquiry of the witnesses he thinks fit, in order to answer the objection. In *Rex v. Remnant*,(b) on a case reserved for the opinion of the Judges, none of them seemed to have any doubt but that it was competent and proper for the Judge to do so.(c)

(v) *Rex v. Wakefield and others*, *cor. Hullock, B.*, *Murray's ed.* p. 238. in which case a gentleman at the Scotch bar was examined as to whether the marriage, as proved by the witnesses, would be a valid marriage according to the Scotch law.

(w) The order is made, on the application of a prisoner, as an indulgence, not as a matter of right, 1 *Chit. Cr. L.* 618. 1 *Burn. Just. tit. Evidence*, p. 999.

(x) *Attorney-General v. Bulpit*, 9 *Price* 4.

(y) *Rex v. Webb*, *cor. Best, J.*, *MS. Mann. Dig.* p. 324.

(z) *Pomeroy v. Baddeley*, *Ry. & Mood. N. P. C.* 430.

(a) *Rex v. White*, 3 *Campb.* 98. *cor. Lord Ellenborough. Rex v. Parkins*,

Ry. & Mood. N. P. C. 166. *cor. Abbott, C. J.*

(b) *Russ. & Ry. C. C. R.* 136.

(c) If a witness is called by the crown to disprove the defence set up by the prisoner, he can only be examined to contradict the specific facts which form the defence. Thus where the prosecutor, in a case of larceny, rests his case on the prisoner's recent possession of the goods, and the prisoner calls a witness to prove that he bought them of J. T.; if J. T. be called by the prosecutor, he can only prove such matters as go to negative the prisoner's case, and cannot prove that he saw the prisoner commit the theft, *Rex v. Stimpson*, 2 *C. & P.* 415. *cor. Garrow, B.*

SECTION IV.

How the Credit of Witnesses may be impeached.

There are four methods by which a person may impeach the credit of a witness who is called against him, besides the disproval of the facts stated by the witness. 1. By cross-examination. 2. By proof of statements made by him previous to his examination, inconsistent with his present evidence. 3. By proof of his acts and declarations touching the matters in issue. 4. By general evidence of his character.

Methods of
impeaching
credit of wit-
ness.

1. As to impeaching the credit of a witness by cross-examination. If a witness be asked a question, for the purpose of shewing him unworthy of credit, the answer to which has a tendency to expose him to a penalty, or to any kind of punishment, or to a criminal charge, (as, for instance, if he be asked whether he has been guilty of theft, fraud, or any offence subjecting him to a penalty or criminal proceeding) he is not obliged to answer.(c) So far has this principle been carried, that in an action for a libel, which was published by the defendant in a voluntary affidavit, sworn extrajudicially before a magistrate, it was held that the magistrate's clerk was not bound to answer whether he wrote the affidavit, and delivered it to the magistrate; because, it was said, the bare copying out of a libel is criminal.(d) An accomplice who is admitted to give evidence against his associate in guilt, though bound to make a full and fair confession of the whole truth respecting the subject matter of the prosecution, is not bound to answer with respect to his share in other offences, in which he was not concerned with the prisoner; for he is not protected for such offences.(e) But although a witness is not compellable to

1. By cross-
examination
of the witness
as to his own
conduct, &c.

Questions
tending to cri-
minate.

Such ques-
tions may be
asked.

(c) See the cases collected, 1 Phil. Ev. 262. 1 Stark. Ev. 136. (See also *ante*, p. 619. as to the obligation to answer where the answer might subject to a civil suit.) The protection is not confined to questions where the answer would lead to an immediate conclusion of guilt, but extends to all questions that tend to criminate the witness. Thus, where a witness in an action by the indorsee against the drawer of a bill, where the defence was usury, was asked whether the bill had ever been in his possession before, and the witness said he thought his answer would have a tendency to convict him of the offence of usury, for which he had been indicted, it was held, that he was not bound to answer the question, *Cates v. Hardacre*, 3 Taunt. 424.

(d) *Maloney v. Bartley*, 3 Campb. 210.

(e) West's case, MS. 1 Phil. Ev. 37 n. 7. A witness who answers questions tending to criminate himself on his examination in chief, is bound to answer on the cross-examination, though his answer may implicate his life: per Dampier, J. Manning's Index, tit. Witness, pl. 222. See also *East v. Chapman*, 1 Mood. & Malk. 47. S. C. 2 Carr & P. 570., and in *Dixon v. Vale*, 1 Carr & P. 278. Best, C.J., laid it down that if a witness, being cautioned that he is not compellable to answer a question that may criminate him, chooses to answer it, he is bound to answer all questions relative to that transaction; and cannot be allowed to object that any further question has a tendency to criminate him.

Questions
tending to de-
grade.

Authorities
that they need
not be an-
swered.

Cooke's case.

answer questions of this description, it should seem that such questions may legally be asked.^(f) As to questions which are asked, upon cross-examination, for the purpose of throwing discredit on a witness, and which tend merely to disgrace and degrade him, without subjecting him to a penalty or criminal charge, the authorities are conflicting on the point whether he is compellable to answer them. In Cooke's case,^(g) on an indictment for high treason, the prisoner, in order to challenge a jurymen, asked him if he had not said he was guilty and would be hanged. Lord Chief Justice Treby overruled the question, and said, "You may ask upon the *voire dire*, whether he has any interest in the cause; nor shall we deny you liberty to ask, whether he be fitly qualified according to law by having a freehold of sufficient value: but that you may ask a juror or witness every question that will not make him criminous, that is too large. Men have been asked, whether they have been convicted and pardoned for felony, or whether they have been whipped for petty larceny, but they have not been obliged to answer; for, although their answer in the affirmative will not make them criminal, nor subject them to punishment, yet they are matters of infamy, and if it be an infamous thing, that is enough to preserve a man from being bound to answer. A pardoned man is not guilty: his crime is purged. But merely for the reproach of it, it shall not be put upon him to answer a question, whereon he will be forced to forswear or disgrace himself. So, persons have been excused from answering, whether they have been committed to Bridewell as pilferers or vagrants, &c.; yet to be suspected is only a misfortune and shame, no crime. The like has been observed in other cases of odious and infamous matters, which are not crimes indictable."

Layer's case.

So in Layer's case,^(h) the Court would not allow the witness to be examined on the *voire dire*, as to whether he had been promised a pardon or reward for swearing against the prisoner; and Lord C. J. Pratt said, "if the objection goes to his credit, must he not be sworn, and his credit left to the jury? No person is to discredit himself, but is always taken to be innocent till it appear otherwise." In the case of Sir John Friend,⁽ⁱ⁾ who was tried for high treason, it was held that a witness could not be asked whether he was a Roman Catholic, because he might subject himself to penalties by his answer: and Treby, C. J., said,

(f) See the observations of the Judges in *Rex v. Watson*, 2 Stark. 149. *et seq.* *Rex v. Holding and Wade*, O. B. 1821. *cor.* Bayley, J., MS. Archb. Crim. Pl. 102. S. C. 1 Arch. Pract. 193. *Harris v. Tippet*, 2 Campb. 637. *cor.* Lawrence, J. *Contra*, *Rex v. Lewis*, 4 Esp. N. P. C. 225. *Macbride v. Macbride*, *ib.* 242.; but see 1 Phil. Ev. 268. Indeed, if the imputation contained in a question is so connected with the enquiry and the point in issue, that the fact may be proved by other evidence, and the adverse party intends to call witnesses

for that purpose, the witness proposed to be discredited must be asked whether he has been guilty of the offence imputed, *post* p. 650, 653. And Lord Tenterden has ruled that the counsel in a cause have no right to object, in favour of a witness, that the answer to a particular question renders him liable to punishment or forfeiture; such objection belongs to the witness only, *Thomas v. Newton*, 1 Mood. & Malk. N. P. C. 48. n. (a) to *East v. Chapman*. (g) 4 St. Tr. 748. 1 Phil. Ev. 266. (h) 6 St. Tr. 259. (i) 4 St. Tr. 606.

"No man is bound to answer any questions that will subject him "to penalties or to infamy." The expressions of the two eminent Judges mentioned above are certainly very strong and direct on the point, that a witness is not compellable to answer degrading questions put for the purpose of discrediting him: at the same time it must be remarked, that such a decision was not necessary in any one of the above cases. In the first case (*Rex v. Cooke*), the question was asked, not to discredit a witness, but to exclude a jurymen. In the second (*Laver's case*), the object of the examination was not to shew the witness unworthy of credit, but incompetent to give evidence: and in the last case (*Sir John Friend's*), there was a sufficient objection to the question, on the ground that the answer might subject the witness to penalties. There are two modern decisions at *Nisi Prius*, in accordance with the doctrine laid down by the Chief Justices in the above case. In the *King v. Lewis and Others*,^(k) which was an indictment for an assault, the prosecutor in the course of cross-examination, was asked if he had not been in the House of Correction in Sussex, and Lord Ellenborough interposed, and said, that that question should not be asked; that it was formerly settled by the Judges, among whom were Chief Justice Treby and Mr. Justice Powell, both of whom were great lawyers, that a witness was not bound to answer any question, the object of which was to degrade, or render him infamous. The case of *M'Bride v. M'Bride*,^(l) was an action of assumpsit, in which a woman being called as a witness for the plaintiff, the counsel for defendant was proceeding to examine her as to her living in a state of concubinage with the plaintiff, but Lord Alvanley interposed, and said, he thought questions as to general conduct might be asked, but not such as went immediately to degrade the witness. His Lordship added, "I do not go so far as others may. I will not say a witness shall not be asked to what may tend to disparage him, that would prevent an investigation into the character of a witness, which it may often be of importance to ascertain. I think those questions only should not be asked which have a direct and immediate effect to disgrace or disparage the witness."

Lewis's case.

M'Bride v.
M'Bride.

In the trial of *O'Coigley and O'Connor*,^(m) for high treason, where a witness was asked, on cross-examination, how many informations he had laid, for the purpose of throwing an imputation on him as a common informer, whereupon he appealed to the protection of the Court; it was held that the question should not be repeated or followed up by another.

O'Coigley and
O'Connor's
case.

In addition to these cases must be mentioned that of *Rex v. Hodgson*,⁽ⁿ⁾ which was an indictment for a rape upon Harriet Halliday. After she had given her evidence, she was cross-examined by the prisoner's counsel, who puts these questions to her, "Whether she had not before had connection with other persons?" and "Whether she had not before had connection with a particular person (named)?" It was objected that she was

Hodgson's
case.^(k) 4 Esp. 225.^(l) 4 Esp. N. P. C. 242.^(m) 26 How. St. Tr. 1353.⁽ⁿ⁾ Russ. & Ry. C. C. R. 211.

not obliged to answer these questions; and Mr. Baron Wood allowed the objection, on the ground that she was not bound to answer them, as they tended to criminate and degrade her. And on a case reserved, the twelve Judges determined that the objection was properly allowed.^(o)

Authorities
that they must
be answered.

Rex v. Ed-
wards.

Frost v. Hol-
loway.

Cundell v.
Pratt.

If witness de-
clines to an-
swer, it can
have no effect
on the jury.

On the other hand, there are the following authorities in favour of the position, that the witness is compellable to answer questions which merely disgrace or disparage. In the *King v. Edwards*,^(p) on an application to bail the prisoner, who was charged with grand larceny, one of the bail was asked whether he had not stood in the pillory for perjury? This question was objected to, as tending to criminate him: but the Court overruled the objection, saying, there was no impropriety in the question, as the answer could not subject him to any punishment; and the bail admitting the fact, he was rejected. In the case of *Frost v. Holloway*,^(q) the counsel in cross-examining a witness, asked him whether he had not been tried for theft at Reading. The witness refused to answer, and appealed to Lord Ellenborough, whether he was bound to answer such a question. Lord Ellenborough said, "If you do not answer the question I will commit you;" adding, "you shall not be compelled to say, whether you were guilty or not." This occurred at the sittings after Hil. Term, 1818; and it would appear, that his Lordship had changed his opinion, as to the obligation on the witness to answer, since his decision in the case of *Rex v. Lewis* and others, as above mentioned. The latest authority on this subject is that of *Cundell v. Pratt*,^(r) in which Best, C. J., said, "Until I am told by the House of Lords that I am wrong, the rule I shall always act on is, to protect witnesses from questions, the answers to which may expose them to punishment; if they are protected beyond this, from questions that tend to degrade them, many an innocent man would unjustly suffer."^(s)

Assuming that a witness be not compellable to answer degrading questions, it seems allowed, (as in the case of criminating questions, see *ante*, p. 625) that the questions may legally be asked.^(x) If the witness declines answering questions tending either to criminate or degrade him, it seems hardly possible to avoid coming to a conclusion almost as unfavourable to his credit as if he had admitted the misconduct imputed to him in the question: but in *Rex v. Watson*,^(y) Holroyd, J., said that he had under-

at the house where he lost the property, 1 Carr & P. 85.

^(p) 4 T. R. 440.

^(q) MS. 1 Phil. Ev. 269. ⁽ⁿ⁾

^(r) 1 Mood. & Malk. N. P. C. 108.

^(s) See also 1 Arch. Pract. 193. Arch. Cr. Pl. 102., where a MS. case of *Rex v. Holding and Wade* is cited, in which Bayley, J., held that all questions must be answered except those the answer to which may subject the witness to punishment.

^(x) See 1 Phil. Ev. 268.

^(y) 2 Stark. N. P. C. 157, 158.

^(o) See also *Dodd v. Norris*, 3 Campb. 519. S. P. mentioned by Lord Ellenborough as having been decided by all the Judges. It may be observed, that besides degrading the witness, her answer might have subjected her to punishment in the spiritual court. In *Rex v. Pitcher*, which was an indictment against a female prisoner for stealing from the person, Hullock, B., would not allow the prosecutor to be asked, on cross-examination, whether any thing improper passed between him and the prisoner

stood the rule to be that if you propose a question to a witness and he declines to answer it, his not answering it can have no effect on the jury. And in *Rose v. Blakemore*, (z) where a witness for the plaintiff refused to answer a question, whether he had published a particular handbill, on the ground that he had been threatened with a prosecution for the publication; and the counsel for the defendant, in his address to the jury, put it to them that the witness really must have been concerned in the publication, for that a denial of it, if he could deny it, would not injure him; Abbott, C. J., interposed and said, that no such inference ought to be drawn, and that there was an end of the protection of a witness, if a demurrer to the question were to be taken as an admission of the fact enquired into. And in *Lloyd v. Passingham*, Lord Eldon expressed a similar opinion.(a)

If the question be of a tendency to criminate or degrade, and the witness answers it, the cross-examining party must be satisfied with the answer, and will not be allowed to falsify it by evidence;(p) that is, if the question be merely collateral to the point in issue; for if it be relevant to it, and the witness deny the thing imputed, evidence may be called to contradict. Thus where a witness for a prosecution in larceny had been asked in cross-examination, whether he had not been charged with robbing his master, and whether he had not afterwards said he would be revenged of him, and would soon fix him in gaol, and had denied both; Lawrence, J., ruled, that as to the former his answer must be taken as conclusive; but that as the words were material to the guilt or innocence of the prisoner, evidence might be adduced, that they were spoken by the witness.(q)

Witness's answer conclusive.

The rule which requires the best evidence to be produced of which the nature of the thing is capable is, it should seem, in some degree relaxed in regard to cross-examination for the purpose of discrediting a witness;(j) for the rule is to be understood as applicable only to the proof of the issue or some fact material to the issue.(k) Thus it is usual in practice to ask in cross-examination an accom-

Rule that best evidence possible must be given not applicable to cross-examination to discredit: *semble*.

(z) Ry. & Mood. N. P. C. 382.

(a) 16 Ves. 64. See the note of the Reporters in *Rose v. Blakemore*, in which doubts are ably expressed, with deference to such high authorities, whether these *dicta* be not inconsistent with the general principles, on which the rules concerning the right of witnesses to refuse an answer to questions have been established.

(p) *Rex v. Watson*, 2 Stark. N. P. C. 149, 151, 158. *Rex v. Clarke*, 2 Stark. N. P. C. 244. per Holroyd, J., *Harris v. Tippet*, 2 Campb. 637. *cor.* Lawrence, J. For the court will not try a collateral question whether the witness has been guilty of the misconduct imputed to him. However in this case of *Harris v. Tippet*, which has been relied upon by very high authorities in support of the general rule, (see *Rex v. Watson*, 2 Stark.

155. 158.) it may be perhaps doubted whether the decision of the learned judge in this particular instance was correct, although the principle laid down by him undoubtedly is so. The witness being called for the defendant, was asked whether he had not attempted to dissuade a witness examined for the plaintiff, from attending the trial; the question therefore, it may be argued, was not altogether collateral, but so connected with the cause that other witnesses might be called to contradict him. See the Queen's case, 2 B. & B. 311. *post.* p. 632.

(q) *Yewin's case*, 2 Campb. 638., see also the Queen's case, 2 Brod. & Bing. 313, and *post.* p. 632.

(j) See *post.* chap. III. sect. 2.

(k) 1 Phill. Ev. 286, 287, 288.

police or other witness, who appears against a person on a criminal prosecution, whether he has not been tried for some offence; although the fact of his having been tried for such an offence is partly matter of record, and therefore, according to the general rule, not to be proved without the record, which is the highest species of proof. (*l*)

2. By proof of contradictory statements.

A foundation must be laid on cross-examination.

Proof of contradictory statements in writing.

2dly. The credit of a witness may be impeached by giving evidence of his having said or written touching the cause, what is at variance and inconsistent with his testimony on the trial. (*r*) But in order to lay a foundation for such discrediting evidence, it is necessary first to ask the witness, whom it is proposed to discredit, by proof of contradictory *verbal* statements, upon cross-examination, whether he has made the statement or declaration or held the conversation which it is intended to prove. (*s*) Thus, if a witness, on being examined in chief as to some transaction supposed to have occurred between certain persons, should admit, that he had heard of such a thing, but does not know its cause, it would be irregular to prove his having made a declaration respecting the cause, in order to shew his knowledge of the cause, without first asking him in the cross-examination whether he had not made such a declaration; or if he had answered that he did not remember the transaction, it would be equally irregular, without such previous cross-examination, to prove declarations made by him respecting the transaction for the purpose of shewing, that he must have remembered it: (*t*) for it would, in many cases, have an unfair effect upon the witness and upon his credit, and would deprive him of that reasonable protection which it is the duty of the court to afford to every person who appears as a witness, to allow proof of his former conversation without first interrogating him as to that conversation and reminding him of it, in order to call up all the powers of his memory as to the transaction. (*u*) With respect to the mode of proceeding where a contradictory statement formerly made by

(*l*) 1 Phil. Ev. 289. But if the object is, not merely to discredit, but to exclude the witness altogether on the ground of his conviction for a crime, the conviction must be regularly proved by the production of the record. *Ante*, p. 594.

(*r*) *De Saily v. Morgan*, 2 Esp. N. P. C. 691. *Christian v. Coumbe*, 2 Esp. 489. See *post*. chap. II. s. 2. as to the depositions of a witness before a magistrate being used for this purpose. In order to impeach the credit of a witness for a defendant upon an information for assaulting revenue officers, by proving that on an information before two magistrates against the same defendant for having smuggled goods in his possession, he gave a different account of the matter, proof of the conviction containing the testimony of the witness is

insufficient; it is necessary to prove it by the testimony of those who heard what was said. *Rex v. Howe*, 1 Campb. 461. S.C. 6 Esp. 125.

(*s*) *The Queen's case*, 2 Brod. & Bing. 299.

(*t*) *The Queen's case*, 2 Brod. & Bing. 299. 1 Phil. Ev. 279.

(*u*) 2 Brod. & Bing. 300. *Abbott, C. J.*, in delivering the opinion of the Judges, added, that in any grave or serious case, if the counsel had, on his cross-examination, omitted to lay the necessary foundation, the Court would, of its own authority, call back the witness in order to give him an opportunity of doing so. Another reason why he ought to be cross-examined is, that he may have an opportunity of explaining his conduct, 2 Brod. & Bing. 314.

the witness in writing is proposed to be produced to discredit him, some important rules were laid down in the House of Lords in the Queen's case. (v) A witness named Louisa Dumont, who had been called on the behalf of the prosecution, was asked upon cross-examination whether she had not made particular statements, which the counsel read to her out of a supposed letter to her sister: it was objected that the letter itself should be put in before any use could be made of its contents: and thereupon the following question was proposed to the Judges: Whether in the courts below, a party, on cross-examination, would be allowed to represent, in the statement of a question, the contents of a letter, and to ask the witness, whether the witness wrote a letter to any person with such contents, or contents to the like effect, without having first shewn to the witness the letter, and having asked that witness whether the witness wrote that letter, and his admitting that he wrote such letter? The Judges answered this in the negative; and Abbott, C. J., stated their reasons to be that the contents of every written paper are to be proved by the paper itself, and by that alone, if the paper be in existence: the proper course, therefore, was to ask the witness whether or no that letter was of the handwriting of the witness. If the witness admits this, the cross-examining counsel may, at his proper season, read that letter as evidence. (w) A second question was at the same time put to the Judges, part of which was whether the court would allow a witness in case he should not admit that he did or did not write the same, to be examined to the contents of such letter. (x) To which the learned Judges gave an answer in the negative, for the same reason which led them to give the answer to the first question, viz. that the paper itself is to be produced, in order that the whole may be seen, and the one part explained by the other.

A very distinguished writer on the law of evidence, (y) has stated his opinion, that the determination of these points has left the question still open, whether counsel may be allowed to cross-examine a witness as to his having given a different account of the transaction, or as to his having written a letter containing a different account; because, in the Queen's case, the question put to the witness related to a variety of particular expressions, and entire passages, supposed to be contained in a letter, and the letter, which was supposed to contain such expressions, had been actually produced, and shewn by the counsel: whereas the ques-

The witness must not be cross-examined as to the contents, but the paper must be shewn him, and he must be asked if it is his writing.

If he admits it, it may be read as part of the evidence on the other side.

If he does not admit it, he cannot be cross-examined to its contents.

Whether a witness may be asked on cross-examination the general question, whether he has written a different account. Query.

(v) 2 Brod. & Bing. 286.

(w) *Id. Ibid.* But if he suggests to the court that he wishes to have the letter read immediately in order to found certain questions upon its contents, that cannot be well or effectually done without reading the letter itself; in that case, for the more convenient administration of justice, the letter is permitted to be read, but considering it as part of the evidence of the counsel proposing it and subject to all the consequences of it's being so

considered, *Ibid.* 289, 290.

(x) The other part of the question was, whether when a letter is produced in the court below, the court would allow a witness to be asked, upon shewing the witness only a part or one or more lines of such letter, and not the whole of it, whether he wrote such part; and the judges were of opinion that it should be answered in the affirmative.

(y) 1 Phil. Ev. 284.

tion, proposed above, is quite general, namely, whether the witness has given any account in his letters, or otherwise, differing from his present account, and the question is proposed without any reference to the circumstance, whether the letter is or is not in existence, or whether it has or has not ever been seen by the cross-examining counsel.(z) And the eminent author above alluded to, argues with great force and ability, that such a question may be asked with propriety.(a)

What questions may be asked to lay a foundation for contradictory evidence.

In order to lay a foundation for contradicting a witness, the questions asked upon cross-examination must, in some way, be relevant to the matter in issue. Thus, in an action for usury, the person with whom the contract, alleged to be usurious, had been made, was produced as a witness for the plaintiff, and the counsel for the defendant proposed to cross-examine him as to other contracts he had made with other persons, which were not usurious; intending, if the witness answered in the affirmative, to draw the conclusion that he had made the same contract with the defendant, and if the witness denied the nature of those other contracts, to call evidence to prove the contrary, and thereby destroy the witness's credit. But Lord Ellenborough refused to suffer the question to be put, conceiving it to be entirely irrelevant to the issue in the cause; and the Court of King's Bench were afterwards all of opinion, that he had acted properly; and they laid down the rule, that it is not competent for counsel on cross-examination to question the witness concerning a distinct collateral fact, which if answered affirmatively, is wholly irrelevant to the matter in issue, for the purpose of discrediting him, if he answers in the negative, by calling other witnesses to contradict him.(r) It need hardly be observed, if a question be wholly irrelevant, and therefore improperly asked on cross-examination, and the witness nevertheless give an answer to it, the cross-examining party may not call evidence to contradict that answer; but it is further to be remarked, that many questions may be asked with propriety on cross-examination, which are irrelevant to the matter in issue, yet are allowable because they go to the credit of the witness but the distinction is, as to the right to call evidence to contradict answers given to questions put to shake a witness's credit, that if the questions go merely to his credit, and are in other respects collateral to the issue, evidence cannot be called to contradict the answers; if they not only go to his credit, but are also connected with the subject of enquiry, then it is allowable to call witnesses to contradict. Thus, if a witness be asked on cross-examination, whether he has been guilty of a crime, or any conduct which would dis-

In what cases evidence may be called to contradict.

(z) Mr. Phillipps applies the same reasoning to another resolution of the Judges, during the same proceedings, viz that if a witness be asked whether he has represented such a thing, they should direct the counsel to ask, whether the representation had been made in writing or words. This opinion of the Judges, the above learned writer conceives to have been founded on the supposition that the witness's let-

ter was actually in the possession of the cross-examining counsel, and on the circumstance of the question relating to particular expressions, supposed to have been contained in the letter.

(a) 1 Phil. Ev. 286, *et sequ.* See also 3 Stark. Ev. 1745.

(r) *Spencely v. De Willott*, 7 East. 108.

credit him as a witness, but is unconnected with the matters in issue, and he denies it, his answer is conclusive ;(b) but if the imputed misconduct be relative to the subject of enquiry, as, if a witness for the crown be asked whether he had not said that he would be revenged on the prisoner, and would soon fix him in gaol,(c) or whether he had not made declarations to procure persons corruptly to give evidence in support of the prosecution,(d) then evidence may be called to contradict him, if he denies the words or declaration imputed to him ; and if the witness declines to give any answer to such a question proposed to him, by reason of the tendency thereof to criminate himself, and the Court is of opinion that he cannot be compelled to answer, the adverse party has also, in this instance, his subsequent opportunity of tendering his proof of the matter, which is received, if by law it ought to be received.(e)

When the witness declines to answer.

3dly. The credit of a witness may be impeached, not only by giving evidence to prove statements made by him at variance with his testimony, but by calling witnesses to prove his declarations and acts touching the subject matter of enquiry. (f) And the rules above stated, as to the necessity of a previous cross-examination of the witness whom it proposed to discredit, apply equally to this method of discrediting him as to the last. So that if it is intended to offer evidence of former declarations of a witness, or of acts done by him, though not with a view to contradict his statement upon oath in examination in chief, but with a view of discrediting him as a corrupt witness ; in this case also it has been determined that the witness should be previously questioned to such declarations, or such acts, on the cross-examination ;(g) for in one case as well as the other an opportunity must be afforded the witness of explaining his conduct before evidence can be adduced to impeach his credit by proof of the fact.

3. By proof of witness's acts and declarations touching the cause.

Previous cross-examination necessary.

After a witness has been cross-examined respecting his former statements and declarations, for the purpose of affecting his credit, the counsel who called him has a right to re-examine him so as to give him an opportunity of explaining such statements and declarations. Thus if that which the witness has stated in answer to the question on his cross-examination, arose out of the enquiries of the person with whom he had the conversation, the witness may be asked in re-examination what those enquiries were. (h) And he may also be asked what induced him to give to that person the account which he has stated in the cross-examination. (i)

Re-examination.

But this, it should seem, is the limit of such a re-examination. Lord C. J. Abbott, in delivering his opinion in the Queen's case, said, " I think the counsel has a right, upon a re-examination, to ask all questions which may be proper to draw forth an explanation of the sense and meaning of the expressions used by the

(b) *Ante*, p. 629.

(c) *Yewin's case*, 2 Campb. 638.

(d) *The Queen's case*, 2 Brod. & Bing. 311.

(e) *The Queen's case*, 2 Brod. & Bing. 313, 314.

(f) *The Queen's case*, 2 Brod. & Bing. 311.

(g) 2 Brod. & Bing. 311. 1 Phil. Ev. 280.

(h) 2 Brod. & Bing. 295.

(i) *Ibid*.

"witness on cross-examination, if they be in themselves doubtful; and, also, of the motive, by which the witness was induced to use those expressions: but I think, he has no right to go further, and to introduce matter new in itself, and not suited to the purpose of explaining either the expressions or the motives of the witness." (j)

His Lordship afterwards observed, "I distinguish between a conversation which a witness may have had with a party to the suit, whether criminal or civil, and a conversation with a third person. The conversations of a party to the suit, relative to the subject matter of the suit, are, in themselves, evidence against him in the suit, and, if a counsel chooses to ask a witness as to any thing which may have been said by an adverse party, the counsel for that party has a right to lay before the Court the whole which was said by his client in the same conversation; not only so much as may explain or qualify the matter introduced by the previous examination, but, even matter not properly connected with the part introduced upon the previous examination, provided only, that it relate to the subject matter of the suit; because it would not be just to take part of a conversation as evidence against a party, without giving to the party, at the same time, the benefit of the entire residue of what he said on the same occasion. But the conversation of a witness with a third person is not in itself evidence in the suit against any party to the suit. It becomes evidence only as it may affect the character and credit of the witness, which may be affected by his antecedent declarations, and by the motive, under which he made them; but, when once all which had constituted the motive and inducement, and all which may shew the meaning of the words and declarations has been laid before the Court, the Court becomes possessed of all which can affect the character or credit of the witness, and all beyond this is, in my opinion, irrelevant and incompetent." (k)

4. By proof of witness's character.

4thly. The credit of a witness may be impeached by proof of his general character. It is now completely settled with respect to this mode of discrediting a witness, that general evidence only, and not evidence as to particular facts, can be employed; (l) for if it were allowable to give evidence of particular collateral facts to affect his credit, the inquiry might branch out into an indefinite number of issues. Besides which, although a witness may be supposed capable of defending his general character, no man can come prepared to give an answer to particular facts, which might be sworn against him to impeach his character, without any previous notice given to him. (m) The proper mode, therefore, of

(j) 2 Brod. & Bing. 297.

(k) 2 Brod. & Bing. 297, 298. The other Judges, except Mr. Justice Best, agreed with the Lord Chief Justice; but the Lord Chancellor and Lord Reddell were of the same opinion with Mr. Justice Best, and differed from the other Judges; inasmuch as they thought that the entire conversation ought to be admitted; not as evidence

of any fact that might be asserted in the course of it, but solely and simply as explanatory of the witness's motives, and as setting his character and credit in a fair, full, and impartial point of view.

(l) Rex v. Watson, 2 Stark. N.P.C. 149. Bull. N. P. 296. 1 Phil. Ev. 276.

(m) Bull. N. P. 296.

examining a witness, who is called to discredit a previous witness by proof of his character, is to ask whether the present witness has had the means of knowing the former witness's general character, and whether, from such knowledge, he would believe him on his oath.⁽ⁱ⁾ In answer to such evidence against character, the other party may cross-examine the witness as to his means of knowledge, and the grounds of his opinion; or may attack his general character.^(k)

A party cannot bring evidence to confirm the character of a witness before the credit of that witness has been impeached, either upon cross-examination, or by the testimony of other witnesses.^(l) Thus, in a case where a witness for one party asserts one thing, and a witness for the other party asserts the contrary, and direct fraud is not imputed to either, evidence to the good character of either witness is not admissible.^(m) But if the character of a witness has been impeached, (although, according to some authorities, upon cross-examination only,) evidence on the other side may be given in support of the character of the witness by general evidence of good conduct.⁽ⁿ⁾ So in a case where two attesting witnesses to a will, which was impeached on account of fraud in procuring it, were dead, and a surviving attesting witness was called, and spoke to a fraudulent execution, it was held allowable to call evidence to the general good character of the deceased witnesses: ^(o) and Lord Ellenborough, in approving of that decision, observed, that if they had been alive, they might have been produced, and their characters would have appeared on cross-examination; and being dead, justice required that an opportunity should be given of shewing what credit was to be given to their attestation.^(p) Whether in answer to proof of statements made by a witness in variance with his testimony at the trial, evidence may be given by the party who called the witness, that he affirmed the same thing on other occasions, and is still consistent with himself, is a point on which there are conflicting authorities.^(q) The better opinion seems to be that such evidence is not admissible; except in cases where the counsel on the other side impute a design to misrepresent from some motive of interest or relationship; there in order to repel such imputation, it may be proper to shew that the witness made a similar statement at a time when the supposed motive did not exist, or when motives of interest would have prompted him to make a different statement of the facts.^(r)

Character of witness, how supported.

⁽ⁱ⁾ *Mawson v. Hartsink*, 4 Esp. N. P. C. 102. So, upon an indictment for a rape, the character of the prosecutrix, as to general chastity, may be impeached by general evidence; but not by evidence of particular facts, *ante*, vol. 1. p. 563.

^(k) 1 Phil. Ev. 278.

^(l) *Bishop of Durham v. Beaumont*, 1 Campb. 207. 1 Stark. Ev. 148.

^(m) 1 Campb. 207.

⁽ⁿ⁾ 1 Stark. Ev. 148. *Bate v. Hill*, 1 Carr & P. 160. *Rex v. Clarke*, 2 Stark. N. P. C. 241., where the prosecutrix, upon an indictment, for an

attempt to commit a rape, having been cross-examined as to having been sent to the house of correction on a charge of theft, evidence of her subsequent good conduct was admitted in support of the prosecution: *cor.* *Holroyd, J.*; but see *Dodd v. Norris*, 3 Campb. 519.

^(o) By *Ld. Eldon* in *Doe v. Stephenson*, 3 Esp. 284. By *Ld. Kenyon* in *Doe v. Walker*, 4 Esp. 50.

^(p) 1 Campb. 210.

^(q) *Gilb. Ev.* 135. *Bull. N. P.* 294.

^(r) 1 Phil. Ev. 291. 1 Stark. Ev. 148. See also the opinion expressed

Party may not discredit his own witness, by proof of his character : but he may prove his case by other witnesses.

If a party calls a witness to prove a fact, he cannot, when he finds the witness proves the contrary, give general evidence to shew that that witness is not to be believed on his oath : (s) for that would be to enable the party to destroy the witness if he spoke against him, and to make him a good witness if he spoke for him, with the means in his hands of destroying his credit if he spoke against him. (t) But if a witness gives evidence contrary to that which the party calling him expects, the party is at liberty to make out his own case by other witnesses ; and to shew that the facts which his own witness has stated contrary to his interest were otherwise ; (u) for such facts are evidence in the cause, and the other witnesses are not called directly to discredit the first witness, but the impeachment of his credit is incidental, and consequential only. (v) Still a party is not at liberty to set up so much of his witness's testimony as makes for him, rejecting and disproving so much as makes against him (w)

Seemle.

He cannot discredit his own witness by proof of contradictory statements.

If a witness is called to prove a fact, and gives his evidence to the contrary, it is not, it should seem, competent for the party calling him to prove that the witness has previously given a different account, for the purpose of shewing that he is unworthy of credit. (x) However, in *Oldroyd's case*, (y) where the counsel for the prosecution at first declined examining the prisoner's mother, but the Judge thought it right to have her examined, (her name being on the back of the indictment as having been examined before the grand jury,) which was accordingly done, and she gave her evidence in favour of the prisoner ; the Judge ordered her deposition before the coroner to be read, in order to shew its inconsistency with her present testimony. And the twelve Judges af-

by Bayley, J., in *Withen v. Law*, 3 Stark. N. P. C. 63. See also *post*. Chap. III. sect. 3. Of *Hearsay Evidence*.

(s) *Ewer v. Ambrose*, 3 B. & C. 750. Bull. N. P. 297.

(t) Bull. N. P. 297.

(u) 3 B. & C. 749, 750, 751. *Richardson v. Allan*, 2 Stark. N. P. C. 331. *Alexander v. Gibson*, 2 Campb. 555. Particularly where the witness is forced on a party by law : as for instance, a subscribing witness to a will or deed. Thus in *Lowe v. Jolliffe*, 1 W. Bl. 365, the subscribing witness to a deed, swore to the testator's insanity ; yet the plaintiff was allowed to examine other witnesses in support of his case, to prove that the testator was sane. So in *Pike v. Badmering*, cited in 2 Stra. 1096., where the three subscribing witnesses to a will denied their hands, the plaintiff was permitted to contradict that evidence.

(v) Bull. N. P. 297.

(w) 2 Campb. 556.

(x) *Ewer v. Ambrose*, 3 B. & C. 746. Assumpsit for money had and received. Plea, that the promises were made

with S. Baker and defendant jointly, and issue thereon : S. Baker was called by defendant to prove the partnership, but he proved the contrary. Defendant then tendered in evidence an answer in Chancery of S. Baker's, in which he swore he was defendant's partner. The Judge admitted it, (giving the plaintiff leave to move,) and left it to the jury to find for the plaintiff or defendant, according as they gave credit to S. Baker's answer in Chancery, or to his testimony given in Court. The Court of King's Bench expressed a strong opinion that the answer was not admissible ; but they granted a new trial, on the ground that the Judge had left the answer to the jury, as it were substantive evidence of the fact of the partnership. *Holroyd, J.*, said, that though the answer certainly was not admissible to prove generally, that the witness was not worthy of credit, it might, perhaps, be admissible, if the effect were only to shew that, as to the particular fact sworn to at the trial, the witness was mistaken.

(y) *Russ. & Ry. C. C. R. 88.*

terwards were of opinion, that the Judge had a right to call for the deposition, in order to impeach the witness's credit; and Lord Ellenborough and Mansfield, C. J., thought that the prosecutor had the same right.

SECTION V.

How many Witnesses are necessary.

In general, the testimony of a single witness is a sufficient legal ground for conviction of a crime or misdemeanor,^(z) even though that single witness may have been the accomplice in guilt of the accused person.^(a) But there are two exceptions to this rule, *viz.* the cases of treason and perjury.

Single witness generally sufficient.

The evidence of one witness is not sufficient to convict the defendant on an indictment for perjury: as in such case there would be only one oath against another.^(b)

In case of perjury.

In high treason, (not concerning the current coin, or the King's seals, or sign manual,) no one can be convicted, unless by the oaths and testimony of two witnesses, either both to the same overt act, or one of them to one, and the other of them to another overt act of the same treason: unless the party indicted shall willingly, without violence, in open Court confess the same.^(c) The confession contemplated, is a confession in open Court, or pleading guilty: any other confession, whether made to persons in authority or not, is evidence in the case, and must be proved, like other facts, by two witnesses, and it will have its weight with the jury according to the circumstances, as confessions have in all criminal cases.^(d) However, by stat. 39 & 40 Geo. 3. c. 93., "In all cases of high treason, when the overt act alleged in the indictment is the assassination of the King, or any direct attempt against his life, or against his person, the prisoner shall be tried according to the same order of trial, and upon the like evidence, as if he stood charged with murder."

High treason.

Two witnesses not necessary in cases of personal attacks on the King.

In petit treason and misprision of treason, as well as high treason, by the statutes 1 Edw. 6. c. 12. s. 22., and 6 Edw. 6. c. 11.

Petit treason and misprision of treason.

(z) 4 Black. Com. 357. 2 Hawk. c. 46. s. 3.

(a) *Ante*, p. 599.

(b) *Ante*, p. 544, 515.

(c) By statutes 1 Edw. 6. c. 12. s. 22. 6 Edw. 6. c. 11. s. 12. 7 & 8 Wm. 3. c. 3. In high treason concerning the coin, or the King's seals, or sign manual, one witness is sufficient, as at common law before the reign of Edward the Sixth; by stat. 1 & 2 Ph.

& M. c. 10. s. 13., and 1 & 2 Ph. & M. c. 11. s. 3. See *ante*, Vol. I. p. 62. It has been agreed by all the Judges, that these statutes extend to all offences touching the impairing of coin, which should afterwards be made treason. Gahagan's case, 1 Leach 42. 1 East. P. C. 129. S. C.

(d) 1 East. P. C. 131. Foster's Crown Law 240, &c.

s. 12., two witnesses are required, unless the party arraigned shall willingly, without violence, confess the same.(e)

SECTION VI.

How the Attendance of Witnesses is to be compelled and remunerated.

Attendance of witnesses; how compelled.

There are two methods in which the attendance of witnesses in criminal cases may be compelled: 1st, which is the more ordinary and effectual means, the Justice or Coroner that takes the examination of the person accused, and the information of the witnesses, may at that time, or at any time after and before the trial, bind over the witnesses to appear.(a) 2dly, By process of subpoena.

By recognizance.

1st. If a witness does not appear according to the terms of the recognizance in which he is bound, at the Court at which the trial is intended to be, to give evidence against the party accused, the recognizance may be estreated, and the penalty levied. Justices have authority by stat. 7 Geo. 4. c. 64. s. 3. to bind all persons by recognizance to give evidence in cases of misdemeanors, in like manner as in cases of felony. If a witness who has been examined before a Justice of the peace, refuses to be bound over, the Justice may commit him.(b) And where the witness was a married woman, and therefore under a legal disability to enter into a recognizance, the Justice was held justified in committing her, upon her refusal to appear to give evidence or to find sureties for her appearance.(c)

Misdemeanors.
7 Geo. 4. c. 64.

Witness committed for refusing to enter into recognizance.

By subpoena.

2d. The attendance of witnesses, if they have not entered into recognizances, may be compelled by process of subpoena, which may either be issued from the Crown Office,(d) or may be made out by the clerk of the peace of the sessions, or the clerk of assize.(e) And by stat. 45 Geo. 3. c. 92. s. 8., the service of a subpoena on a witness in any one of the parts of the United Kingdom, for his appearance on a criminal prosecution in any other of the parts of the same, shall be as effectual as if it had been in that part where he is required to appear.

45 Geo. 3. c. 92. s. 3.

How served.

The prosecutor ought not to include more than four persons in

(e) But a bill is now pending in parliament, by which it is proposed to be enacted, that petit treason shall be treated in all respects as murder.

(a) 2 Hale P. C. 284. Stat. 7 Geo. 4. c. 64. s. 2, 3, 4.

(b) 2 Hale P. C. 284. Bennet v. Watson, 3 M. & S. 1.

(c) 3 M. & S. 1.

(d) Rex v. Ring, 6 T. R. 585.

(e) 1 Chitt. C. L. 608. It is more prudent to sue it out of the Crown Office, if an application for an attachment for non-attendance is likely to become necessary. See post. p. 640.

one subpoena. (f) And as soon as the writ is obtained, a copy should be made out for each witness, and served on him personally, and at the same time the writ should be shewn him. (g) The service must be personal, and made a reasonable time before the day of trial; for witnesses ought to have a convenient time to put their own affairs in such order, that their attendance on the Court may be of as little prejudice to themselves as possible. (h)

If a witness have in his possession any deeds or writings, which it is deemed necessary to produce at the trial, there should be a special clause inserted in the subpoena, called a *duces tecum*, commanding the witness to bring them with him. (i) The writ of subpoena *duces tecum* is the regular and established process of the Court; and though it was formerly doubted, yet it is now settled, that this process is of compulsory obligation on the witness, to produce the deeds or writings required of him, which he has in his possession, and which he has no lawful or reasonable excuse for withholding; of the validity of which excuse, the Court, and not the witness, is to judge. (j) And a person in possession of any paper, who is served with a subpoena *duces tecum*, is bound to produce it, whether the paper belong to him or not, or though there be a regular way prescribed by law for obtaining it. (k) The Court however, in all such cases, will exercise their discretion in deciding what papers shall be produced, and under what qualifications as respects the interest of the witness. (l)

Subpoena
duces tecum.

When a witness is in custody, or on board a ship under the command of an officer who refuses to permit his attendance, the subpoena is ineffectual, and a *habeas corpus ad testificandum* is necessary to bring him up; for which an application may be made to any one of the Judges or Barons of the Courts of King's Bench, Common Pleas, and Exchequer, in England or Ireland, who have discretionary power to grant it to any part of the United Kingdom, to bring a witness before any court of record, to be examined before such courts, or any grand, petit, or other jury, in any cause or matter, civil or criminal. (m) And every justice of great session in Wales, and in the county palatine of Chester, has the like authority within the limits of his jurisdiction. (n) The application for this writ must be made upon an affidavit sworn to by the party applying, stating that the party is a material witness, and willing to attend; (o) and if he be at a distance, it should be

*Habeas corpus
ad testifican-
dum.*

(f) *Dee v. Andrews*, Cowp. 845. Tidd 855.

(g) In order to save expence, it is settled that service of a ticket, containing the substance of a writ, will be as effectual as service of the writ itself. 1 Phil. Ev. 3.

(h) Tidd 853.

(i) Tidd 855.

(j) *Amey v. Long*, 9 East. 473. Tidd 855.

(k) Tidd 856. *Corson v. Dubois*, Holt N. P. C. 339.

(l) Tidd. 856. It will be observed, that there is a distinction between the

obligation of a witness to answer, though it may subject him to a civil responsibility, and the obligation to produce writings under a subpoena. See *ante*, p. 619. If a subpoena *duces tecum* be served, the party must bring his deeds in obedience to the subpoena; but if he states them to be his title deeds, no Judge will ever compel him to produce them. *Pickering v. Noyes*, 1 B. & C. 263.

(m) 43 Geo. 3. c. 140. 44 Geo. 3. c. 102. Tidd 859.

(n) *Ibid.*

(o) Tidd 858.

shewn how he is material. (p) The writ being sued out, should be left with the sheriff, or other officer, in whose custody the witness is detained, who will bring him up, upon being paid his reasonable charges. (q) If a witness be a prisoner of war, a *habeas corpus* will not lie to bring him up, but an order from the secretary of state must be obtained. (r)

Subpœna for prisoner.

At common law, a defendant in capital cases had no means of compelling the attendance of witnesses without the special order of the Court; (s) although in misdemeanors the defendant has always been allowed to take out subpœnas. (t) But the statute 7 W. 3. c. 3. s. 7. provided, that in cases of high treason, where corruption of blood might be worked, the persons indicted shall have the like process of the court where they shall be tried, to compel their witnesses to appear for them, as is usually granted to compel witnesses to appear against them: and since the stat. 1 Ann. st. 2. c. 9. s. 3. by which it is provided that witnesses for the prisoner, in case of treason or felony, shall be sworn in the same manner as witnesses for the crown, and be subject to the same punishment for perjury, the process by subpœna is allowed to defendants in cases of felony as well as in other instances. (u)

Remedy against person neglecting to appear on subpœna.

If a party having been served with a subpœna, neglect to appear in obedience to it, an application may be made to the Court of King's Bench, if the subpœna issued from the Crown Office, for an attachment against him; (v) and where the process is served in one part of the United Kingdom for the appearance of the witness in another of the parts, the Court issuing the same may, upon proof to their satisfaction of the due service of the subpœna, transmit a certiorari of the default of the witness, under the seal of the Court, or under the hand of one of the Justices thereof, to the Court of King's Bench if the service were in England, to the Court of Justiciary if in Scotland, and to the Court of King's Bench in Ireland if in Ireland; which Courts are empowered to punish the witness in the same way as if he had disobeyed a subpœna issued out of those courts, provided the expences have been tendered. (w) It has been doubted whether in all cases, as well as in those within the last mentioned statute, a witness may not lawfully refuse to obey a subpœna on a criminal prosecution, as well as a civil suit, unless he has a tender of his reasonable expences; but the better opinion seems to be, that witnesses making default on criminal prosecutions are not exempted from attachment, on

Expences need not be tendered.

(p) Tidd 858. It is said in 1 Chitt. C. L. 610., that the affidavit of readiness to attend only applies when the party is on board ship, and not then in all cases.

(q) Tidd 860.

(r) *Furly v. Newnham*, 2 Dougl. 419.

(s) 4 Black. Com. 359. 2 Hawk. c. 46. s. 170. If they had attended they could not have been sworn before the stat. 1 Ann. st. 2. c. 9. s. 3.

(t) 2 Hawk. c. 46. s. 170.

(u) 2 Hawk. P. C. c. 46. s. 172.

(v) *Rex v. Ring*, 8 T. R. 585. And

a witness who refuses, after being subpœnaed, to attend to give evidence for a defendant, is liable to an attachment as in the case of being subpœnaed by a prosecutor, 1 Stark. Ev. 119.

(w) 43 Geo. 3. c. 92. s. 3. 4. 1 Chit. Cr. L. 614. It is said to be doubtful whether the Justices at Sessions, &c. have authority to issue an attachment, and that the only mode of proceeding against a witness in such a case is by indictment, Archb. Cr. L. 108.

the ground that their expenses were not tendered at the time of the service of the subpoena: although the Court would have good reason to excuse them for not obeying the summons, if in fact they had not the means of defraying the necessary expences of the journey. (x)

Formerly the law provided no means for reimbursing the witnesses on criminal prosecutions. At length, by stat. 27 Geo. 2. c. 3., 18 Geo. 3. c. 19., and 58 Geo. 3. c. 70., in cases of felony, certain provisions were made for that purpose. These, however, did not extend to cases of misdemeanors; but now by stat. 7 Geo. 4. c. 64. s. 22. (repealing the above mentioned statutes) it is enacted, "That the Court before which any person shall be prosecuted or tried for any felony, is hereby authorised and empowered, at the request of the prosecutor, or of any other person, who shall appear on recognizance or subpoena to prosecute or give evidence against any person accused of any felony, to order payment unto the prosecutor of the costs and expences which such prosecutor shall incur in preferring the indictment, and also payment to the prosecutor and witnesses for the prosecution, of such sums of money as to the Court shall seem reasonable and sufficient to reimburse such prosecutor and witnesses for the expences they shall have severally incurred in attending before the examining magistrate or magistrates and the grand jury, and in otherwise carrying on such prosecution, and also to compensate them for their trouble and loss of time therein; and, although no bill of indictment be preferred, it shall still be lawful for the Court, where any person shall in the opinion of the Court, *bond fide* have attended the Court in obedience to any such recognizance or subpoena, to order payment unto such person of such sum of money as to the Court shall seem reasonable and sufficient to reimburse such person, for the expences which he or she shall have *bond fide* incurred by reason of attending before the examining magistrate or magistrates, and by reason of such recognizance or subpoena, and also to compensate such person for trouble and loss of time; and the amount of the expences of attending before the examining magistrate or magistrates, and the compensation for trouble and loss of time therein, shall be ascertained by the certificate of such magis-

Attendance of witnesses how remunerated.

Courts may order payment of the expences in all cases of felony.

(x) 1 Phil. Ev. 11.; but see 1 Chit. Cr. L. 613. At York Summer Assizes, 1820, Bayley, J., ruled, that an unwilling witness, who required to be paid before he gave evidence, could not demand it. He said, "I fear I have not the power to order you your expences." And on asking the bar if any one recollected an instance, Scarlett answered, "It is not done in criminal cases." MS. 1 Chetw. Burn. 1001. In *The King v. Cooke*, an indictment for a conspiracy removed into the King's Bench by *certiorari*, a witness called by the defendant

stated before he was examined, that at the time he was served with a subpoena, no money was paid him; he therefore asked that the Judge would order the defendant to pay him his expences before he was examined: Park, J., having consulted with Garrow, B., said they were of opinion that the Judge had no power in a criminal case to order a defendant to pay a witness his expences although subpoenaed, and though the indictment came to be tried as a civil record, 1 Carr. & P. 321.

In certain cases of misdemeanor.

"trate or magistrates, granted before the trial or attendance in court, if such magistrate or magistrates shall think fit to grant the same; and the amount of all the other expences and compensation shall be ascertained by the proper officer of the court, subject nevertheless to the regulations to be established in the manner hereinafter mentioned." And by s. 23. after reciting that for want of power in the Court to order payment of the expences of any prosecution for a misdemeanor, many individuals are deterred by the expence from prosecuting persons guilty of misdemeanors, it is further enacted, "that where any prosecutor or other person shall appear before any Court on recognizance or subpoena, to prosecute or give evidence against any person indicted of any assault with intent to commit felony, of any attempt to commit felony, of any riot, of any misdemeanor for receiving any stolen property knowing the same to have been stolen, of any assault upon a peace officer in the execution of his duty, or upon any person acting in aid of such officer, of any neglect or breach of duty as a peace officer, of any assault committed in pursuance of any conspiracy to raise the rate of wages, of knowingly and designedly obtaining any property by false pretences, of wilful and indecent exposure of the person, or wilful and corrupt perjury, or of subornation of perjury, every such Court is hereby authorised and empowered to order payment of the costs and expences of the prosecutor and witnesses for the prosecution, together with a compensation for their trouble and loss of time, in the same manner as Courts are herein-before authorised and empowered to order the same in cases of felony; and although no bill of indictment be preferred, it shall still be lawful for the Court, where any person shall have *bond fide* attended the Court, in obedience to any such recognizance, to order payment of the expences of such person, together with a compensation for his or her trouble and loss of time, in the same manner as in cases of felony; provided, that in cases of misdemeanor the power of ordering the payment of expences and compensation shall not extend to the attendance before the examining magistrate."

Protection of witness from arrest.

A person subpoenaed as a witness, or bound over by recognizance, either to prosecute or give evidence, or attending voluntarily for the *bond fide* purpose of giving evidence, is privileged from arrests during the necessary time occupied in going to the place where his attendance is required, in staying there for the purpose of such attendance, and in returning from that place.(y) And in allowing witnesses time sufficient for these purposes, the Courts are always disposed to be liberal.(z) If a witness under these circumstances be arrested, the Court out of which the subpoena issued, or the Judge of the court in which the cause has

(y) *Meekins v. Smith*, 1 H. Bl. 636. *Lightfoot v. Cameron*, 2 Bl. 1113. *Childerston v. Barrett*, 11 East. 439. *Arding v. Flower*, 8 T. R. 536. But this privilege does not extend to arrests by his bail, for the purpose of

being surrendered; for he is supposed to be in their custody even while attending as a witness. *Ex parte Lyne*, 3 Stark. C. 132.

(z) 1 Phil. Ev. 4.

been or is to be tried, will, upon application, order him to be discharged.(a)

When any offence has arisen in India, which is tried in this country, the evidence of witnesses resident in India may be obtained in the manner prescribed by stat. 13 Geo. 3. c. 63. s. 40. 44.(b) And in case of a prosecution for any offence committed abroad by any person employed in the public service, the evidence of witnesses resident abroad may be obtained in the mode pointed out by stat. 42 Geo. 3. c. 85.

Evidence of
witnesses resi-
dent abroad.

(a) Archb. Cr. Pl. 108.

(b) See *post*. cap. 2. s. 2. as to de- positions or interrogatories by consent.

CHAPTER THE SECOND.

OF CONFESSIONS AND ADMISSIONS.—OF EXAMINATIONS BEFORE MAGISTRATES.—AND OF DEPOSITIONS.

SECTION I.

Of Confessions and Admissions.

Confessions
sufficient for
conviction
without proof
aliunde.

A FREE and voluntary confession of guilt made by a prisoner, whether in the course of conversation with private individuals, or under examination before a magistrate, is admissible in evidence as the highest and most satisfactory proof, because it is fairly presumed that no man would make such a confession against himself, if the facts confessed were not true.(a) And the highest authorities have now established, that a confession, if duly made, and satisfactorily proved, is sufficient alone to warrant a conviction, without any corroborating evidence *aliunde*.(b)

Must be free
and voluntary.

But a confession, in order to be admissible, must be free and voluntary: that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence.(c) As

(a) Gilb. Ev. 123. Lambe's case, 2 Leach 554. 4th edition. Mr. Justice Blackstone, and Mr. Justice Forster, entertained a different opinion: (See Post. 243.) The former in the fourth Volume of his Commentaries, p. 357. says, in speaking of confessions made to persons not in authority as magistrates; "Even in cases of felony at common law, they are the weakest and most suspicious of all testimony, very liable to be obtained by artifice, false hopes, promises of favour, or menaces, seldom remembered accurately, or reported with precision; and incapable in their nature of being disproved by other negative evidence."

(b) Wheeling's case, in note 1 Leach 311. Rex v. Eldridge, Russ. & Ry. C. C. R. 440. Rex v. Falkner, *Ibid.* 481.

(c) It is a mistaken notion that evidence of confessions obtained by promises or threats, are to be rejected from regard to public faith. Confessions are received in evidence, or rejected as inadmissible, under a consideration whether they are or are not entitled to credit. A free and voluntary confession is deserving the highest credit, because it is presumed to flow from the strongest sense of guilt; and therefore it is admitted as proof of the crime to which it re-

to what shall be considered as a threat or promise, saying to the prisoner that it would be worse for him if he did not confess, or that it would be better for him if he did, is sufficient to exclude the confession. (d) So a confession induced by saying, "Unless you give me a more satisfactory account, I will take you before a magistrate," (e) or by saying, "Tell me where the things are, and I will be favourable to you," cannot be given in evidence. (f) Where the prosecutor asked the prisoner, on finding him, for the money he, the prisoner, had taken out of the prosecutor's pack, but before the money was produced said, "he only wanted his money, and if the prisoner gave him that, he might go to the devil if he pleased;" upon which the prisoner took 11s. 6½d. out of his pocket, and said it was all he had left of it; a majority of the twelve Judges held, that the evidence was inadmissible. (g) So where a prisoner being in custody, said to the officer who had the charge of him, "If you will give me a glass of gin, I will tell you all about it," and two glasses of gin were given to him, and he made a confession of his guilt, *Best, J.*, considered it as very improperly obtained, and inadmissible in evidence. (h) And a confession made by the prisoner with a view and under the hope of being thereby permitted to turn king's evidence, has been held inadmissible. (i)

In a case where hopes of favour had been given, and the prisoner refused before the magistrate to confess, except upon conditions, Mr. Justice Buller observed, that there must be very strong evidence of an explicit warning by the magistrate not to rely on any expected favour on that account, and it ought most clearly to appear, that the prisoner thoroughly understood such warning before his subsequent confession could be given in evidence. (j) But in a case tried before Mr. Justice Bayley, (k) where it appeared that the prisoner, on being taken into custody, had been told by a person who came to assist the constable, that it would be better for him to confess, but that, on his being examined before the committing magistrate on the following day, he was frequently cautioned by the magistrate to say nothing against himself, a confession under these circumstances before the magistrates, was held to be clearly admissible. In a still later case, it

Confessions made to persons after promises of favor by other parties.

When such are admissible.

fers: but a confession forced from the mind by the flattery of hope, or the torture of fear, comes in so questionable a shape, when it is to be considered as the evidence of guilt, that no credit ought to be given to it: and therefore it is rejected. *Warwickshall's case*, *cor. Eyre and Nares, Barons*, 1 *Leach* 263. Three men were tried and convicted for the murder of Mr. Harrison, of Campden, in Gloucestershire. One of them, under a promise of pardon, confessed himself guilty of the fact. The confession, therefore, was not given in evidence against him, and a few years afterwards it appeared that Mr. Harrison was alive, *Ibid.* n. (a.)

(d) 2 *East. P. C. c. 16. s. 94. p. 659.*

(e) *Thompson's case*, 1 *Leach* 291.

(f) *Cass's case*, *Ibid.* 293. n. (a.)

(g) *Jones's case*, *Russ. & Ry. C. C. R.* 152., but see *Rex v. Griffin*, *Ibid.* 151. *post.* p. 650.

(h) *Rex v. Sexton*, *MS. Chetw. Burn. tit. Confession.*

(i) *Hall's case* in note to *Lambe's case*, 2 *Leach* 559. But where a person had been admitted King's evidence, and confessed, and upon the trial of his accomplices, refused to give evidence, he was convicted upon his own confession. *Rex v. Burley, Stark. Ev. Pt. IV. p. 23. Ante, p. 599.*

(j) 2 *East. P. C.* 658.

(k) *Rex v. Lingate*, 1 *Phil. Ev.* 105.

appeared that a constable told the prisoner he might do himself some good by confessing; the prisoner afterwards asked the magistrate if it would benefit him to confess; on which the magistrate said he could not say it would, and the prisoner declined confessing; but afterwards in his way to prison, he made a confession to another constable; the Judges were unanimous in holding, that the confessions were admissible in evidence, on the ground that the magistrate's answer was sufficient to efface any expectation which the constable might have raised.^(l) And where persons having nothing to do with the apprehension, prosecution, or examination of the prisoner, advised him, in the presence of the constable who had him in custody, to tell the truth, and consider his family; it was held that such admonition was no ground for excluding a confession made an hour afterwards to the constable in prison.^(m) Nor is it any objection to a confession made before a magistrate, that the prosecutor, who was present, first desired the prisoner to speak the truth, and suggested that he had better speak out, provided the magistrate or his clerk immediately checked the prosecutor, desiring the prisoner not to regard him, but to say what he thought proper.⁽ⁿ⁾ So where the counsel for the prisoner objected to a confession before a committing magistrate, and offered to prove, that the wife of the constable had told the prisoner, some days before the commitment, that it would be better for him to confess, Mr. Baron Wood over-ruled the objection, and admitted the confession.^(o)

In the case of *Rex v. Eliz. Gibbons*,^(p) who was indicted for the murder of her bastard child, a surgeon was called to prove certain confessions made by the prisoner to him. He stated that he had held out no threat or promise to induce her to confess; but a woman who was present, said that she had told the prisoner she had better tell all; and then the witness made certain confessions to the surgeon. It was thereupon objected by the counsel for the prisoner, that as the confession was made after an inducement held out, it could not be received in evidence: but Mr. Justice Park, before whom the trial took place, after consulting with Mr. Baron Hullock, held that as no inducement had been held out by the surgeon, to whom the confession was made, and the only inducement had been held out by a person having no authority, it must be presumed that the confession to the surgeon was a free and voluntary one. If the promise had been held out by a person having any office or authority, as the prosecutor, constable, &c. the case would be different: but here some person, having no authority of any sort, officiously says, you had better confess. No confession follows, but some time afterwards, to another person, the prisoner, without any inducement held out, confesses. The learned Judge added, that he and Mr. Baron Hullock had not the least doubt that the evidence was admissible.

(l) *Rex v. Rosier*, 1 Phil. Ev. 105.

(m) *Rex v. Row*, Russ. & Ry. C. C. R. 153.

(n) *Rex v. Edwards*, 1 Phil. Ev. 104.

(o) *Rex v. Hardwick*, 1 Phil. Ev. 105.

(p) 1 Carr & P. 97.

The same law was afterwards laid down by Mr. Baron Hullock, in the case of *Rex v. Tyler and Finch*,^(g) where, the counsel on the part of the prosecution was about to prove a confession of the prisoner Finch made to a constable, and the counsel for the prisoners proposed to shew that the prisoner Finch, being locked up alone in a room at a public house, was told by a man that the other prisoner had told all, and he had better do the same to save his neck: and that on this, he confessed. But the learned Baron held, that as the promise, (if any) was by a person wholly without authority, the subsequent confession to the constable, who had held out no inducement, must be considered as voluntary, and was therefore evidence.

The result of these cases seems to be, that a confession is not inadmissible, although made after an exhortation, or admonition, or other similar influence, proceeding at a prior time from some one who has nothing to do with the apprehension, prosecution, or examination of the prisoner: for a promise made by a person who interferes without any authority of this kind, is not to be presumed to have such an effect on the mind of the prisoner as to induce him to confess.

It is no objection that the confession was made under a mistaken supposition, that some of the prisoner's accomplices were in custody: not even though some artifice has been used to draw him into that supposition.^(r)

Instances of
admissible
confessions.

In a recent case reserved for the opinion of the twelve Judges, a person of the name of Miller, the chief officer of the police at Liverpool, stated, that on the 18th of November, the prisoner, a boy of fourteen years of age, was apprehended by his directions, without any warrant, between twelve and one o'clock, and that he was carried to the police-office about one o'clock. The magistrates were then sitting at a very short distance, and continued sitting till between two and three, and till the business presented to them was finished; but the prisoner was not carried before them, because the police officer was engaged elsewhere. The officer ordered the prisoner to bridewell on his own authority, between four and five o'clock; and between five and six o'clock, he told the prisoner, that in consequence of the falsehoods the prisoner had told, and the prevarications he had made, there was no doubt but he had set the premises on fire; and he therefore asked him if any person had been concerned with him, or induced him to do it? The prisoner said he had not done it. The police officer replied, that he would not have told so many falsehoods as he had, if he had not been concerned in it, and he again asked him if any body had induced him to do it? The prisoner then began to cry, and made a full confession. In speaking of the falsehoods, the police officer referred to an examination of the prisoner he had himself made. The prisoner was taken before he had dined, and had had no food from the time he was apprehended till after his confession. The learned Judge thought it deserved consideration, whether a confession so obtained, when the detention of the prisoner was

Thornton's
case.

(g) 1 Carr & P. 129.

(r) *Rex v. Burley*, 1 Phil. Ev. 104.

perhaps illegal, and when the conduct of the officer was calculated to intimidate, was admissible in evidence, and reserved the point for the opinion of the Judges. In Trinity term 1824, the Judges met and considered this case, and the majority of the Judges present, *viz.* Abbott, Ld. C. J., Alexander, C. B., Graham, B., Park, J., Burrough, J., Garrow, B., Hullock, B., held the confession rightly received, on the ground that no threat or promise had been used. Best, C. J., Bayley, J., Holroyd, J., were of the contrary opinion.^(s)

In another case,^(t) where the prisoner, while in gaol, asked the turnkey if he would put a letter into the post for him, and after his promising to do so, the prisoner gave him a letter addressed to his father, and the turnkey instead of putting it into the post, gave it to the visiting magistrates of the gaol, who gave it to the prosecutor; it was held by Mr. Baron Garrow, that the letter so obtained, was admissible in evidence; and the learned Baron said, he remembered, making an objection, when at the bar, to evidence under the same circumstances before Mr. Justice Gould, who over-ruled it.

Rex v. Gilham.
Confession obtained by the influence of religious persuasion.

In the case of *Rex v. Gilham*, very lately reserved for the opinion of the twelve Judges, and argued before them in Easter Term, 1828, the prisoner had been tried and convicted for murder; principally upon the evidence of his own confessions to the gaoler and the mayor. These confessions the prisoner had been induced to make by the previous exertion of religious persuasion on the part of the chaplain of the gaol, and under the influence of his representations of the Christian necessity and benefit of confessing. The Judges were of opinion that the confessions had been properly received, and that the conviction was right; upon the ground, it is understood, that there were no temporal hopes of benefit or forgiveness held out: and that such hopes if referrible merely to a future state of existence, are not within the principle on which the rule for excluding confessions obtained by improper influence is founded.

Confessions made after a former one unduly obtained.

If a confession has been obtained from the prisoner by undue means, any statement afterwards made by him under the influence of that confession, cannot be admitted as evidence.^(u)

In the case of *Rex v. Sarah Nute*,^(v) the prisoner was suspected of setting fire to an outhouse; her mistress pressed her to confess, and told her among other things, if she would repent and confess, God would forgive her, but she concealed from her that she would not forgive her herself: she confessed. The next day another person in her mistress's sight, though out of her hearing, told her, her mistress said she had confessed, and drew from her a second confession. Ld. Eldon, C. J. (C. P.) allowed the confessions in evidence, and the prisoner was convicted. The jury on having the confessions put to them, said they thought the first confession made under a hope of favour here, and the second under the influence of having made the first. On a case reserved, the Judges held these points were not for the jury, but if Lord

^(s) *Rex v. Sylvester Thornton*, Ry. & Mood. C. C. R. 27.

^(t) *Rex v. Derrington*, 2 C. & P. 418.

^(u) 2 East. P. C. c. 16. s. 94. p. 658. *Rex v. White*, 1 Phil. Ev. 104.

^(v) MS. in Chetw. Burn. tit. Confession.

Eldon agreed with the jury, which he did, the confessions were not receivable; but many of them thought the expressions not calculated to raise hope of favour here, and if not, the confessions were evidence. So in *Rex v. Sexton*,^(w) a confession had been improperly obtained by giving the prisoner two glasses of gin: the officer to whom it had been made, read it over to the prisoner before the committing magistrate, who told the prisoner the offence imputed to him, affected his life, and a confession might do him harm. The prisoner said, that what had been read to him, was the truth, and signed the paper. Best, J., considered the second confession, as well as the first, inadmissible; and said, that had the magistrate known the officer had given the prisoner gin, he would, no doubt, have told the prisoner that what he had already said, could not be given in evidence against him, and that it was for him to consider whether he would make a second confession. If the prisoner had been told this, what he afterwards said would be evidence against him: but for want of this information, he might think that he could not make his case worse than he had already made it, and under this impression might sign the conviction before the magistrate.

It has been said that a prisoner ought not to be questioned by a magistrate; and in the case of *Rex v. Wilson*,^(s) the prisoner's statement was on this account rejected as inadmissible; but Mr. Starkie in his *Treatise on Evidence*,^(t) observes that by the statute of Phil. and Mar.^(u) the magistrate is to take the *examination* of the prisoner, and he cites a case where Mr. Justice Holroyd admitted the prisoner's examination to be read against him notwithstanding this evidence. And in a still later case^(v) Mr. Justice Littledale held that the examination of the prisoner taken before the committing magistrate, was admissible, though it appeared that part of it had been elicited by questions put by the magistrate. So a confession obtained without threat or promise from a boy fourteen years of age, by questions put by a police officer in whose custody the boy was, on a charge of felony, was held rightly received.^(x) So in *Rex v. Mercer*^(y) it was proposed in the course of the evidence for the prosecution, to prove what had been said by the defendant in his examination before a committee of the House of Commons, which the defendant had been compelled to attend: and on the part of the defendant it was objected that since this statement had been made under a compulsory process from the House of Commons, and under the pain of incurring punishment as for a contempt of the House, the declarations were not voluntary and could not be admitted for the purpose of criminating the defendant; but Abbott, J., over-ruled the objection and admitted the evidence.^(z)

Confessions elicited by questions.

^(w) *Ubi supra.*

^(s) Holt N. P. C. 597. *cor.* Richards, C. B.

^(t) Appendix, Part IV. p. 59.

^(u) Repealed and substantially re-enacted by stat. 7 Geo. 4. c. 64., see *Post.* 654.

^(v) *Rex v. Ellis*, 1 Ry. & Mood.

432. S. P. ruled at the Old Bailey, Feb. 1828, on an indictment for murder, *Rex v. Jones*.

^(x) *Rex v. Silvester Thornton*, 1 Ry. & Mood. C. C. R. 27. *Ante*, p. 646.

^(y) 2 Stark. N. P. C. 366.

^(z) So if a witness answers ques-

Examination
on oath not
admissible.

But the account given by a prisoner before a magistrate ought not to be upon oath; and if the prisoner has been sworn, his statement cannot be received. (a) And where the examination of a prisoner before the magistrate previous to his committal, purported to have been taken on oath, Mr. Justice Le Blanc refused to admit evidence to shew, that in fact the examination was not on oath. (b)

Discoveries in
consequence
of confes-
sions.

It has been determined by the opinions of all the judges that although confessions, improperly obtained are not admissible, yet that any facts, which have been brought to light in consequence of such confessions may be received in evidence. (c) Thus where a prisoner was indicted as an accessory after the fact, for having received property, knowing it to be stolen, and had, under promises of favour, made a confession: and in consequence of it the property had been found in her lodgings, concealed between the sackings of her bed: it was held that the fact of finding the stolen property in her custody might be proved, although the knowledge of it was obtained by means of an inadmissible confession. (d) So where a prisoner indicted for stealing a number of diamonds and pearls had been improperly induced to make a confession from which it appeared that he had disposed of part of them to a certain person: it was held allowable on the part of the prosecution to call that person to prove that he had received the property from the prisoner. (e) As far as these cases go, there can be no difficulty as to the propriety of their decisions, because the bare facts of the property being found in the possession of the prisoner in the one case, and of his dealing with it as his own in the other, would, unconnected with any confession, have been clear evidence in support of the prosecution. But the cases have gone further than this, for it has been held that, on a prosecution for receiving stolen goods, where a confession had been improperly drawn from a prisoner, in the course of which he described the place where the goods were concealed, evidence might be given *that he did so describe the place*, and that the goods were afterwards found there. (f) In this case it is clear that the bare fact of finding the goods would be no evidence against the prisoner, unless coupled with a part of the improperly obtained confession. And some have accordingly doubted whether any part of such a confession can be used for such a purpose. Thus in the case of Richard Harvey, Lord Eldon, C. J., said, that

tions to which he might have demurred as subjecting him to penalties, his answers may be used against him for all legal purposes; and therefore in an action on 5 Geo. 2. c. 30. s. 21., the defendant's examination before the commissioners was allowed to be given in evidence, to shew that by his own confession he had concealed the property of the bankrupt, *Smith v. Beadnell*, 1 Campb. 30. See also *Stockfleth v. De Tastet*, 4 Campb.

10.

(a) *Rex v. Smith*, 1 Stark. N. P. C. 242. As to examinations by magistrates generally, see *post*. 654.

(b) *Ibid*.

(c) 1 Phill. Ev. 108.

(d) *Rex v. Warickshall*, 1 Leach 263. O. B. 1783. S. P. Mosey's case, 1 Leach 265. (n). O. B. 1784.

(e) *Lockhart's case*, 1 Leach 396.

(f) *Grant's case and Hodge's case*, 2 East. P. C. 658.

where the knowledge of any fact was obtained from a prisoner under such a promise as excluded the confession itself from being given in evidence, he should direct an acquittal: unless the fact itself proved would have been sufficient to warrant a conviction without any confession leading to it; and he so directed the jury in that case. (g) But the more established rule, according to later practice and later authorities is, that so much of the confession as relates *strictly* to the fact discovered by it may be given in evidence; for the reason of rejecting extorted confessions is the apprehension that the prisoner may have been induced to say what is false; but the fact discovered shews that so much of the confession as immediately relates to it is true. (h) Thus it is proper, and it is now the common practice, to leave to the consideration of the jury, where a confession has been improperly obtained, the fact of the witness having been directed by the prisoner where to find the goods, and his having found them accordingly, but not the acknowledgment of the prisoner having stolen or put them there, which is to be collected or not from all the circumstances of the case. (i)

So it has been determined, after a consideration by all the Judges, that although confessions improperly obtained cannot be received in evidence, yet that any *acts* done afterwards may be given in evidence, notwithstanding they were done in consequence of such confession. (j)

Acts done in consequence of a confession.

And from a decision in a late case (k) it should seem that what the prisoner says, at the time such acts are done, may also be received in evidence. In that case the prisoner was charged with stealing a guinea and two promissory notes. It appeared in evidence that one of the notes was a Bank of England note for five pounds, and the other a Reading bank note for the like sum. The prosecutor told the prisoner he had better confess. Mr. Justice Chambre held that although the prosecutor could not be allowed to prove a confession made after this admonition, he might be permitted to give evidence that the prisoner brought to him a guinea and a five pound Reading bank note, *which he gave up to the prosecutor as the guinea and one of the notes that had been stolen from him.* The note thus produced the prosecutor could not identify, otherwise than by its corresponding with the stolen note in the sum for which it was given, and in being a note of the same bank. Upon a conviction and a case reserved, the majority of the judges (l) agreed with Mr. Justice Chambre in thinking the conviction right and the evidence admissible. (m) But where a prisoner was indicted for larceny, and had

Declarations accompanying such acts.

(g) At *Bodmin* Summer Assizes, 1800, 2 East. P. C. 658. See also *Mosey's case*, 1 Leach 265, in note to Warickshall's case.

(h) *Rex v. Butcher*, 1 Leach 265. n. (a) to Warickshall's case, 2 East. P. C. c. 16. s. 94. p. 658.

(i) 2 East. P. C. c. 16. s. 94. p. 658.

(j) Warickshall's case, 1 Leach

265.

(k) *Rex v. Griffin*, Russ. & Ry. C.R. C. 151.

(l) Lord Ellenborough, Mansfield, C. J., Macdonald, C. B., Heath, J., Grose, J., Chambre, J., and Wood, B.

(m) *Lawrence and Le Blanc, Js.*, were of a contrary opinion, that the production of the money was alone admissible, and not his saying at the

Not admissible except when confirmed.

been induced by a promise from the prosecutor to confess his guilt; and after that confession he carried the officer to a particular house as and for the house where he had disposed of the property, and pointed out the person to whom he had delivered it; that person however denied knowing any thing about it, and the property was never found; it was held by the twelve Judges that not only the confession, but the fact of the prisoner's carrying the officer to the house as above mentioned, was inadmissible in evidence. The confession, it was said by their Lordships, was excluded, because being made under the influence of a promise it could not be relied on, and the acts of the prisoner, under the same influence, *not being confirmed by the finding of the property*, were open to the same objection. The influence which might produce a groundless confession, might also produce groundless conduct. (g)

Confession evidence against the party confessing only, although made in the hearing of an accomplice, who did not deny it.

A man's confession is only evidence against himself, and not against his accomplices. (n) And where the confession was made before a magistrate in the presence and hearing of the accomplice, who did not deny it, Mr. Justice Holroyd held, (o) that these circumstances were not evidence against the latter, and said that it had been so ruled by several of the Judges in a similar case, which had been tried at Chester. (p) If the confession is not in writing, the whole of what the prisoner said must be fully stated, although it may happen that some part of it concerns other prisoners who are tried on the same indictment: in such a case it is not possible to make any selection; for until the evidence has been heard, it cannot be known what it is, or to whom it relates; and all that can be done is, to direct the jury not to take into their consideration such parts as affect the other prisoners. (q) But a distinction might perhaps be made in this respect, in case the confession has been reduced into writing, if that part which relates to the other prisoners is capable of being separated and detached from the rest, and can be omitted without affecting in any degree the prisoner's narration against himself. (r) If, on the part of the prosecution, a confession or admission of the defendant, made in the course of a conversation with a witness, be brought forward, the defendant has a right to lay before the Court the whole of what was said in the same conversation;

Whole of a confession or admission must be stated.

time he produced one of the notes "that it was one of the notes stolen from the prosecutor." And see *Rex v. Jones*, Russ. & Ry. C. C. R. 153. *Ante* 644.

(g) *Rex v. Jenkins*, Russ. & Ry. C. C. R. 492.

(n) *Tong's case*, Kelyng. 18. *Hevey's case*, 1 Leach 232.

(o) *Rex v. Appleby*, 3 Stark. N. P. C. 33. In an action of assault, the defendant offered evidence of what was said by the magistrate before whom the matter had been investigated, in the presence of both plain-

tiff and defendant: but Best, C. J., refused to admit it; and he observed, that what was said by the defendant to the plaintiff was evidence, but not what was said by a third person; or if it drew any answer from the plaintiff, that made it evidence. And his Lordship said, he remembered Gibbs, C. J., making the same distinction. *Child v. Grace*, 1 Carr & P. 193.

(p) As to when the declarations of one conspirator are evidence against all his comrades, see *ante*, 570.

(q) 1 Phil. Ev. 108.

(r) 1 Phil. Ev. 108.

not only so much as may explain or qualify the matter introduced by the previous examination, but even matter, not properly connected with the part introduced upon the previous examination, provided only that it relates to the subject matter of the suit; because it would not be just to take part of a conversation, as evidence against a party, without giving to the party at the same time the benefit of the entire residue of what he said on the same occasion. (a) If a prosecutor uses the declaration of a prisoner, he must take the whole of it together, and cannot select one part, and leave another; and if there be no other evidence in the case, or no other evidence incompatible with it, the declaration so adduced must be taken as true. (b) But if, after the whole of the statement of the prisoner is given in evidence, the prosecutor is in a situation to contradict any part of it, he is at liberty to do so, and then the statement of the prisoner, and the whole of the other evidence must be left to the jury, precisely as in any other case, where one part of the evidence is contradictory to another. (c)

As analogous to the former part of this section, concerning admissions and confessions by the defendant himself, it may be proper in this place to mention the subject of acts and declarations of co-conspirators and of agents. How far the acts and words of one conspirator are evidence against the others, has already been mentioned in a former part of this work. (d) With respect to the statements and acts of agents, it was decided, on the impeachment of Lord Melville, by the House of Lords, that a receipt given in the regular and official form by Mr. Douglas, (who, it was proved, had been appointed by Lord Melville to be his attorney, to transact the business of his office of treasurer of the navy, and to receive all necessary sums of money, and to sign receipts for the same,) was admissible in evidence against Lord Melville, to establish this single fact, that a person appointed by him, as his paymaster, did receive from the Exchequer a certain sum of money in the ordinary course of business. (e) In the Queen's case, (f) it was said by Abbott, C. J., in delivering the

Acts and declarations of co-conspirators and of agents.

Agent of defendant.

(a) By Abbott, C. J., in the Queen's case, 2 Brod. & Bing. 297.

(b) By Bosanquet, Serj. in *Rex v. Jones*, 2 Carr & P. 630. So in a case before Mr. Baron Garrow, where the prisoner was indicted for a larceny, and in addition to evidence of the possession of the stolen goods, the counsel for the prosecution put in the prisoner's statement, made before the magistrate, in which the prisoner asserted that he had bought the goods, the learned Baron directed an acquittal, saying, that if a prosecutor used a prisoner's statement, he must take the whole of it together. *Ibid.*

(c) *Ibid.* So in a civil case, if a person says, "that he did owe a debt, but that he had paid it," such an ad-

mission would not be received as evidence to prove the debt, without being also evidence of the payment. *Per Hale, C. J.* Anonymous case, cited 12 Vin. Abr. tit. Ev. A. 23. What he has said in his own favour may perhaps weigh very little with the jury, while his admission against himself may be conclusive; however, it is reasonable, that if any part of his statement is admitted in evidence, the whole should be admitted. 1 Phil. Ev. 103. See also *Smith v. Blandy*, Ry. & Mood. N. P. C. 257.

(d) *Ante*, p. 570. See also 2 Stark. Ev. tit. Conspiracy.

(e) 29 How. St. Tr. 746. 1 Phil. Ev. 96.

(f) 2 Brod. & Bing. 302.

Agent of pro-
secutor.

opinion of the Judges, that it would not be allowable on the part of the prosecution, to give evidence that an agent, who had been proved to have been employed by the defendant to procure evidence for the defence, but who had not been examined as a witness, offered a bribe to some third person, who also had not been examined. This was not the question proposed by the House of Lords to the Judges, but the converse of it, considered by the Chief Justice, for the purpose of shewing the grounds of the determination of the Judges. The actual question proposed for their consideration was, as to the competency of proving, on the trial of a criminal prosecution, certain acts supposed to have been done by the agent of the *prosecutor*. And they determined that similar proof, as to the conduct of the prosecutor's agent in offering a bribe, was inadmissible. The question, the Lord Chief Justice observed, regarded the act of an agent addressed to a person not examined as a witness in support of the indictment, the proffered proof not apparently connecting itself with any particular matter deposed by the witnesses who had been examined in support of the indictment, and leaving therefore those witnesses unaffected by the proposed proof, otherwise than by way of inference and conclusion. His Lordship concluded by observing, that notwithstanding the opinion he had delivered, he was by no means prepared to say, that in no case, and under no circumstances appearing at a trial, it might not be fit and proper for a Judge to allow proof of this nature, to be submitted for the consideration of a jury; and that the inclination of every Judge was to admit, rather than exclude, the offered proof.

SECTION II.

Examinations before Magistrates.

Examination
of prisoner
before magis-
trate.

1 & 2 P. & M.
c. 13. repealed
by stat. 7 Geo.
4. c. 64.

The cases in the foregoing section are applicable to confessions by prisoners generally; the subject of confessions contained in the statutory examinations of prisoners, before the committing magistrate, remains to be considered in the present section.

By stat. 1 & 2 P. & M. c. 13. intitled "*An act touching bailment of prisoners,*" s. 4. "Justices of the peace, when any prisoner is brought before them for any manslaughter or felony, before any bailment or mainprize, shall take the examination of the said prisoner, and information of them that bring him of the fact and circumstances thereof, and the same, or as much thereof as shall be material, shall put in writing before they make the same bailment: which said examination, together with the said bailment, the said Justices shall certify at the next gaol delivery to be holden within the limits of their commis-

"sion." This statute extended only to cases where the party accused was admitted to bail; but it was further enacted by stat. 2 & 3 P. & M. c. 10. intitled "*An act to take examinations of prisoners suspected of manslaughter or felony*," after reciting the stat. 1 & 2 P. & M. c. 13. and that the said act doth not extend to such prisoners as shall be committed and not bailed, that the Justice "before he shall commit a prisoner brought before him on suspicion of manslaughter or felony, shall take the examination of the prisoner, and the information of those that bring him, of the fact and circumstance thereof, and shall put the same, or as much thereof as shall be material to prove the felony, in writing, *within two days after the said examination*, and the same shall certify in such form and at such time as he ought to do, if such prisoner so committed had been bailed." Between these statutes this difference was observable: by the former, which was confined exclusively to cases where a prisoner arrested for manslaughter or felony *was admitted to bail*, the Justices of the peace must have taken the examination of the prisoner, and the witnesses against him, and put the same in writing *before they made the bailment*; by the latter, which applied only to cases where a prisoner arrested for manslaughter or felony was *committed to gaol*, Justices were required to take the like examinations, but were not obliged to put them in writing immediately, having *two days* given them by the act for that purpose.^(s) It must also be remarked that these statutes did not extend to misdemeanors or high treason.^(t) But the above-mentioned difference has ceased, and the defect has, as far as the not comprehending misdemeanors, been remedied, by the late act for improving the administration of criminal justice (7 Geo. 4. c. 64.): for that statute, (s. 2.) after reciting that it is expedient to amend and extend the provisions of the stat. 1 & 2 P. & M. c. 13., and 2 & 3 P. & M. c. 10. enacts, "That the two justices of the peace, before they shall admit to bail, and the justice or justices, before he or they shall commit to prison, any person arrested for felony, or on suspicion of felony, shall take the examination of such person, and the information upon oath of those who shall know the facts and circumstances of the case, and shall put the same, or as much

2 & 3 P. & M.
c. 10. repealed
by stat. 7 Geo.
4. c. 64.

7 Geo. 4. c. 64.
s. 2.

(s) Burn. Just. by Chetw. tit. Examination.

(t) *Rex v. Paine*, 1 Salk. 281. S. C. 1 Lord Raym. 729. cited by Lord Kenyon in *Rex v. Eriswell*, 3 T. R. 723. 1 Hale 306. They extended however, as the new statute may be considered to do, to petty treason, so far as to make examinations and informations under them admissible in evidence, by reason of the offence being substantially the same as murder, but such an information cannot support a conviction for petty treason if the witness be living, though unable to travel, or kept out of the way by the

contrivance of the prisoner; the stat. 5 & 6 Edw. 6. c. 11. s. 12. requiring the witnesses *if living* to be examined in petty no less than in high treason, Fost. 337. However, as a prisoner may be convicted of murder on an indictment for petty treason, depositions or informations, even in such a case, would be evidence to support a conviction for murder, though not for for petty treason, *Radbourne's case*, 1 Leach 457. A bill is now pending in parliament, by which it is proposed to be enacted, that petty treason shall be treated in all respects as murder.

"thereof as shall be material, into writing; and the two justices shall certify such bailment in writing; and every such justice shall have authority to bind by recognizance all such persons as know and declare any thing material touching any such felony or suspicion of felony, to appear at the next court of oyer and terminer, or gaol delivery, or superior criminal court of a county palatine, or great session or sessions of the peace, at which the trial thereof is intended to be, then and there to prosecute or give evidence against the party accused; and such justices and justice respectively *shall subscribe all such examinations, informations, bailments, and recognizances, and deliver or cause the same to be delivered to the proper officer of the court in which the trial is to be.*"(u)

Sect. 3. Misdemeanors.

And by s. 3. it is enacted, "That every justice of the peace before whom any person shall be taken on a charge of misdemeanor, or suspicion thereof, shall take the examination of the person charged, and the information upon oath of those who shall know the facts and circumstances of the case, and shall put the same, or as much thereof as shall be material, into writing, before he shall commit to prison, or require bail from the person so charged, and in every case of bailment shall certify the bailment in writing, and shall have authority to bind all persons by recognizance to appear to prosecute or give evidence against the party accused, in like manner as in cases of felony; and *shall subscribe all examinations, informations, bailments, and recognizances, deliver or cause the same to be delivered to the proper officer of the court in which the trial is to be, before or at the opening of the court, in like manner as in cases of felony.*"

Parol evidence of examination before magistrate.

As by these statutes the magistrate is expressly enjoined to put the examination into writing, it will be intended that he did as the law requires; and parol evidence of a prisoner's statement before him ought not to be received until it is clearly shewn that in fact such a statement never was reduced into writing.(v) But if in fact the examination was not taken in writing,

(u) This part of the statute removes a difficulty which arose upon the statutes of Philip and Mary, by reason of their directing the magistrate to certify the examination at the next general gaol delivery *within the limits of their commission*; but as it often happened that a felon was taken and examined by a magistrate in a county where the offence was not committed, justices, of necessity, contrary to the words of the statute, certified in the county where the felon was indicted.

(v) Jacob's case, 1 Leach 309. Fearshire's case, *ibid.* 202. Hinxman's case, *ibid.* 310. n. (a). Fisher's case, *ibid.* 311. n. (a). Where the law authorises any person to make an enquiry of a judicial nature, and to

register the proceedings, the written instrument so constructed is the only legitimate medium to prove the result; Stark. Ev. Part IV. p. 1044. Hence parol evidence cannot be received of the declaration of a prisoner taken under the statute, where the examination has been taken in writing. But if the statute had not made the taking an examination in writing a judicial proceeding, there is nothing, it is conceived, in the rules of evidence, which would make the statement reduced to writing primary evidence, to the exclusion of any collateral parol proof of what the prisoner declared. If several witnesses were to hear a confession, not made in the course of an examination under the statute, and one of them were to

parol evidence may be given of the prisoner's declarations. At the Lent Assizes for the county of Stafford, in 1790, one Hall and two others were tried and convicted on an indictment for burglary. The evidence was clear against the two others; but, excepting one or two slight circumstances, certainly not sufficient of themselves to have put Hall on his defence, the only evidence against him was his examination before the magistrate, which was not taken in writing, either by the magistrate or by any other person, but was proved by the *viva voce* testimony of two witnesses who were present, and which amounted to a full confession of his guilt. The case was saved and referred to the consideration of the Judges, whether this evidence of the confession was well received, and the prisoner legally convicted; and all the Judges, except Mr. Justice Gould, were of opinion that the conviction was right.^(r) So a written examination before a magistrate will not exclude evidence of a previous parol declaration, which has not been reduced into writing.^(w) And in *Rowland v. Ashby*,^(x) Best, C. J., said, "My opinion is, that upon clear and satisfactory evidence, it would be admissible to prove something said by a prisoner beyond what was taken down by a magistrate."

If a written examination be produced on the part of the prosecution, as the examination of the prisoner taken in writing by the magistrate according to the statute, it has been said that the prisoner is at liberty to meet such evidence by contrary testimony, and to shew that the written instrument is inaccurate.⁽ⁿ⁾

The examination of a prisoner, when reduced into writing, ought to be read over to him, and it is usually tendered to him for his signature. And by the late statute ^{Signing.} (*y*) the magistrate is expressly required to subscribe it: and it was usual so to do before the statute. The signature however, of the prisoner is not required by the statute, and is only for precaution and for the facility of future proof. (*z*) In *Lambe's case*, (*a*) the question referred to the opinion of the twelve Judges was whether an examination, taken in writing by a committing magistrate, containing a confession of the prisoner's guilt, *not being signed by the prisoner or the magistrate*, was admissible evidence. The examination, after being taken in writing, was read over to the prisoner, who said, "It is all true enough:" but upon the clerk's requesting him to sign it, he said "No: I would rather decline that." A majority of the Judges were of opinion upon principle as well as precedent, that the examination or paper writing was well received in evidence. Mr. Justice Grose in delivering their opinion said, that it was clearly receivable in evidence at common law, and that there was nothing in the statutes 1 & 2 P. & M. c.

reduce it to writing, as it was being delivered, such writing would not exclude the testimony of the other witnesses. See *post*. C. III. s. 2. p. 671.

^(r) Hall's case, cited by Grose, J., in *Lambe's case*, 2 Leach 559. *Rex v. Huet*, 2 Leach 891.

^(w) *Rex v. McCarty*, 2 Stark. Ev.

52. See also *Rex v. Reason and Tranter*, 16 How. St. Tr. 35., by Eyre, J.

^(x) *Ry. & Mood. N. P. C.* 231.

⁽ⁿ⁾ *Stark. Ev. Pt. IV.* p. 1043.

^(y) 7 Geo. 4. c. 64. s. 2, 3.

^(z) 1 Phil. Ev. 107.

^(a) 2 Leach 582.

13. and 2 & 3 P. & M. c. 10. to render it inadmissible. Surely, as the learned Judge observed, if what a man says, though not reduced into writing, may be given in evidence against him, *a fortiori* what he says, when reduced into writing, and afterwards admitted by parol to be true, is admissible. But where the clerk of the magistrate stated that he took down the examination from the mouth of the prisoner, and that it was afterwards read over to him, and he was told he might sign it or not as he pleased, and he declined to sign it; Wood, B., was of opinion that the document could not be read: "In Lambe's case," said the learned baron, "the prisoner, when the examination was read over to him, said it was true; and here if the prisoner had said so the case might have been different." (b) Where the solicitor for the prosecution, on the examination of the prisoner before a magistrate, at the desire of the latter, took minutes of the examination in writing which were read over to the prisoner, who said, "It is all true," but when they were read over to him again, after an interval of a few hours, said that part of them was not true, and refused to sign them, it was held that these minutes might be read in evidence. (c)

Examination taken down in writing, and used to refresh the witness's memory.

Where the prisoner had been examined before the Lords of the council, and a witness took minutes of his examination which were neither signed by him, nor read over to him after they were taken; it was held, that though they could not be admitted in evidence as a judicial examination, yet the witness might be allowed to refresh his memory with them, and having looked at them, to state what he believed was the substance of what the prisoner confessed in the course of the examination. (d) And if an examination before a justice of the peace be taken in writing, under such circumstances of irregularity as preclude the writing from being itself given in evidence, yet, it is submitted, it might be proved, as at common law, by some one who was present, as far as his recollection could enable him to state, that he heard the prisoner make the confession; and if he were the person who wrote down the examination, he might refresh his memory with it. Thus in the case of *Rex v. Telicote*, cited above, it is suggested, with great deference to the high authority of the learned Baron, that, although the written document might have been inadmissible, yet the clerk of the magistrate, who was called as a witness, might have proved what he heard the prisoner say upon his examination,

(b) *Rex v. Telicote*, 2 Stark. N. P. C. 483. See also *Rex v. Bennet*, 2 Leach 553. n. (a). The case of *Rex v. Jones*, not yet reported, was tried upon an indictment for murder at the Old Bailey, in February, 1828. The Court on that occasion allowed evidence to be given of the examination of the prisoner before a magistrate, taken at several times, and reduced to writing by him: the prisoner had declined to sign it, on its being completed and read over to him; but acknowledged it contained

what he had stated, although he afterwards said there were many inaccuracies in the statement he had given. The writing, it is understood, was not admitted as documentary evidence, but as a memorandum to refresh the memory of the magistrate, who gave parol evidence of the prisoner's statement.

(c) *Thomas's case*, 2 Leach 637. See also *Bradbury's case*, *ibid.* 639. n. (a).

(d) *Layer's case*, 16 How. St. Tr. 215.

and might have refreshed his memory by means of the examination which he had written down at the time. (e)

An examination before a magistrate must not be upon oath; and when an examination previous to committal purports to have been taken upon oath, evidence has been held inadmissible, to shew that in fact it was not so taken. (f) It must not be on oath.

It is said by Lord Hale, (g) and upon his authority it is so laid down in the subsequent Treatises on the subject, that an examination, taken before a magistrate, in order to be read in evidence against a prisoner must be proved on oath by the magistrate that took it, or the clerk that wrote it, to have been truly taken. (h) Examination before a magistrate how proved.

SECTION III.

Depositions.

As examinations and depositions before magistrates originate from the same acts of parliament, and are in some respects guided by the same decisions, it may be proper to consider the latter immediately after the former. From what has already been mentioned, (i) respecting the examinations before magistrates, it has appeared that by the statutes 1 & 2 P. & M. c. 13, 14. and 2 & 3 P. & M. c. 10. justices of the peace were enabled and directed to take the depositions of witnesses in cases of felony: and that by the stat. 7 Geo. 4. c. 64. these statutes are repealed and re-enacted with an extension to misdemeanors, and the improvements already pointed out. Depositions before magistrates.

Although there is nothing in these statutes providing that the depositions taken under them shall in any case be evidence, (j)

(e) The effect of the statutes, as far as regards the evidence of a confession, it is submitted, is, that a written examination taken in conformity to them, is evidence *per se*, and the only admissible evidence, of the prisoner's having made a declaration of the things contained therein, whereas at common law, (unless the prisoner had signed the paper, or on its being read to him, had allowed it to be true) the confession must have been proved by some one who heard it, and could recollect it, and the writing could only have been made of use by the person, who wrote it, refreshing his memory with it.

(f) *Ante*, p. 650.

(g) 2 P. C. 52. 284.

(h) In practice, however, it is certainly not unusual to admit the examination to be read upon proof of the identity of the instrument, and of the hand-writing of the magistrate

if he has signed the examination: which now by stat. 7 Geo. 4. c. 64. he is in all cases required to do. See *ante*, 657.

(i) *Ante*, p. 654, *et seq.*

(j) Mr. Starkie in a very able note to the case of *Rex v. Smith*, 2 N. P. C. 211., observes that the two statutes of Ph. & M. seem to have been passed without any direct intention on the part of the legislature to use the examinations and depositions as evidence upon the trials of felons. But the taking of them, having been sanctioned by the Legislature, became, it seems, admissible in evidence upon the rules and principles of evidence already established; and the effect of the statutes in point of evidence seems to consist in removing an objection which would before have occasioned the rejection of such evidence, namely, that the proceeding was *extrajudicial*.

1 & 2 P. & M. c. 13.

2 & 3 P. & M. c. 10.

7 Geo. 4. c. 64.

yet from the construction of the two former by the highest authorities, and upon general principles of evidence it may now be considered as a settled rule, that if it be previously proved satisfactorily to the court, that the witness is dead (*k*) or is insane (*l*) or that he has been kept away by the practices of the prisoner, (*m*) or, as it is said, if he is prevented by sickness from attending, or is unable to travel, (*n*) his deposition may be given in evidence on the trial of an indictment: provided the deposition were [duly taken upon oath (*o*) in the presence of the prisoner, when charged before a magistrate.

Deposition must be duly taken.

and in the presence of prisoner.

It is a general principle of evidence, that to render a deposition of any kind admissible against a party, it must appear to have been taken on oath in a judicial proceeding, and that the party should have had an opportunity to cross-examine the witness. (*p*) Hence a deposition before a magistrate should be shewn to have been taken conformably to the statute, for otherwise it would be extrajudicial, (*q*) and to have been taken in the presence of the prisoner, otherwise he could have had no opportunity for cross-examination. Thus in Woodcock's case (who was tried for the murder of his wife) where the magistrate, at the request of the overseers, visited the deceased who had received a mortal blow, and was then at the poor house, and there in the absence of the prisoner, took her examination upon oath, and reduced it into writing; it was held by Eyre, C. B., that such an examination was not admissible as a deposition; for it was not taken as the statute directs, in a case where the prisoner was brought before a magistrate in custody; the prisoner therefore had no opportunity of contradicting the facts it contained. (*r*) So in Dingers's case (*s*) where the magistrate, at the desire of the parish officers, went to the deceased at the Infirmary to which she had been taken for the purpose of receiving medical assistance, and there in the absence of the prisoner (*t*) took her deposition upon oath, which was reduced into writing, and her mark was set to it; the Court, on

(*k*) 1 Hale P. C. 305. Bull. N. P. 242. 1 Phill. Ev. 351.

(*l*) Rex v. Eriwell, 3 T. R. 720, 721.

(*m*) Harrison's case, 4 St. T. 492, 5th Res. in Lord Morley's case, Keeling, 55. Fost. Disc. 337.

(*n*) 1 Phill. Ev. 351. 1 Hale P. C. 305. 2 Hale P. C. 52. However this has been doubted, upon very sensible grounds, by Mr. Starkie, 2 Evid. 487. In Lord Morley's case, *supra*. 6th Res. it was held that it is not sufficient to prove that all endeavours have been used in vain to find the witness.

(*o*) The statutes of Ph. & M. did not in terms require the informations to be taken upon oath: though it was considered necessarily incidental to the duty of a magistrate so to take them. But by stat. 7 Geo. 4. c. 64. s. 2,

3., they are expressly required to be upon oath.

(*p*) By Hullock, B., in Attorney v. Davison, 1 M'Clel. & Y. 169.

(*q*) Rex v. Smith & Stark, N. P. C. 211. n. (*a*).

(*r*) 1 Leach 500. It was admitted however as a dying declaration.

(*s*) 2 Leach 561.

(*t*) It may be remarked that in these two cases independently of the absence of the prisoner, the deceased being then alive, the charge of murder could not have been preferred: and as the statutes did not at that time extend to misdemeanors the depositions might have been objected to as taken extrajudicially: but in Radbourne's case 1 Leach, 457. a deposition of the deceased taken in the prisoner's presence was held by the twelve judges admissible on the trial for the murder.

the authority of Woodcock's case, held that the deposition was inadmissible. (*u*) But where the greater part of the deposition of the deceased, in a case of murder, had been reduced into writing in the absence of the prisoner, but the deceased was afterwards resworn in the prisoner's presence; and the deposition read over and stated by the deceased to be correct, and the rest of the deposition taken in the ordinary way, in the presence of the prisoner who was asked whether he chose to put any questions; it was held by Richards, C. B., that the deposition was admissible, and a great majority of the Judges upon a case reserved were of opinion that the evidence had been properly received. (*v*)

In this respect there is a very striking difference between depositions before a magistrate and before a coroner; for not only has it been settled, that if any witnesses who have been examined before the coroner are dead or unable to travel, or kept out of the way by the means and contrivance of the prisoner, their depositions may be read on the trial of the prisoner, (*w*) but the prevailing opinion seems to be that they are equally admissible *though the prisoner may have been absent at the time of taking the inquisition*. (*x*) The reasons given for this distinction usually are, that the examination before the coroner is a transaction of notoriety to which every one has right of access; (*y*) and that the coroner is an officer appointed on behalf of the public to make enquiry about the matters within his jurisdiction; and therefore the law will presume the depositions before him to be duly and impartially taken. (*z*) But these reasons and the authorities for the doctrine are certainly not at all satisfactory, and (as it has been remarked by a very sensible writer, (*a*) who has collected and commented on the cases,) since the distinction is not warranted by the

Different rule as to depositions before a coroner.

(*u*) In addition to these authorities, may be mentioned the case of *Rex v. Paine*, 1 Salk. 281. S. C. 5 Mod. 163, cited by Lord Kenyon in *Rex v. Eriswell*, 3 T. R. 722. where upon a conference between the judges of the K. B. and C. P. it was held, that the deposition of a deceased witness was inadmissible "the defendant not being present when they were taken before the Mayor and so had lost the benefit of cross-examination." It is remarkable, that in the above mentioned case of *Rex v. Eriswell*, Grose, J., and Buller, J., were of opinion that depositions taken by a justice of a person who afterwards died, though taken in the absence of the prisoner, might be read, and the latter Judge said it had been so determined by all the Judges in Radbourne's case. But on reference to the report of that case in 1 Leach 457, it will be seen that the depositions were taken in the presence of the prisoner.

(*v*) *Rex v. Smith*, Russ. & Ry. C. C. R. 339. S. C. 2 Stark. N. P. C. 208. Holt N. P. C. 614. In a pre-

vious case, *Rex v. Forbes*, Holt N. P. C. 599., where the constable stated, upon producing the deposition, that the prisoner was not present till a certain part of the deposition, distinguished by a cross, at which period he was introduced, and heard the remaining part of the examination; and when it was concluded, the whole of the deposition was read over to the prisoner, Chambre, J., refused to admit that part of the deposition previous to the mark.

(*w*) 1 Phill. Ev. 354. Lord Morley's case, Kel. 55. Thatcher's case, Sir T. Jones 53. Bromwich's case, 1 Lev. 180. Gilb. Ev. 124.

(*x*) 1 Phill. Ev. 354. Bull. N. P. 242.

(*y*) 3 T. R. 722. 1 Phill. Ev. 355. but in the late case of *Garnett v. Ferrand*, 6 B. & C. 611.; the court expressed an opinion that the coroner might exclude particular persons, if he thought it necessary and proper so to do.

(*z*) Bull. N. P. 242.

(*a*) 2 Stark. Ev. p. 492.

Depositions
admissible
upon trial of
a different of-
fence.

Deposition
need not be
signed by de-
ponent.

Must be by
magistrate.

Parol evidence
of a deposi-
tion, or add-

language of the legislature and is unfounded on principle, it may, when the question arises, be a matter of very grave and serious consideration whether it ought to be admitted. (*b*)

If the depositions were duly taken in conformity to the statute they are receivable in evidence, after the death of the deponent, not only upon the trial of the prisoner for the offence with which he was charged at the time they were taken, but upon an indictment for any other offence. Thus a deposition was held admissible in a case of murder, although it was taken when the prisoner had been brought before two magistrates upon a charge of an assault upon the deceased, and also upon a charge of robbing a manufactory which the deceased had been employed to guard. (*c*)

The statute does not require that the deposition should be signed by the person making it: nor is such signature necessary for its admissibility. In the case of *Rex v. Fleming and Windham*, (*d*) on an indictment for a rape, all the Judges were of opinion that the deposition of a girl, since deceased, upon whom the offence had been committed, taken on oath before the committing magistrate, might be read in evidence, although it was not signed by her.

The magistrate himself, however, by the statute 7 Geo. 4. c. 64. s. 2. is required to subscribe the examinations and informations taken by him.

Parol evidence to add to, or vary the deposition, is not admissible; (*e*) and since, as in the case of examinations, it will be

(*b*) The stat. 1 and 2 P. & M. c. 13. s. 5., enacted, "that every coroner, upon any inquisition before him *found*, whereby any person shall be indicted for murder or manslaughter or as accessory before the murder or manslaughter, shall put in writing *the effect of the evidence* given to the jury before him, being material: and shall certify the same evidence, together with the inquisition or indictment before him taken and found, at or before the time of the trial thereof to be had." And by stat. 7 Geo. 4. c. 64. s. 4. (repealing the above-mentioned statute) it is enacted, "That every coroner, upon any inquisition before him *taken*, whereby any person shall be indicted for manslaughter or murder, or as an accessory to murder before the fact, shall put in writing *the evidence* given to the jury before him, or as much thereof as shall be material; and shall have authority to bind by recognizance all such persons as know or declare any thing material touching the said manslaughter or murder, or the said offence of being accessory to murder, to appear at the next court of oyer and terminer, or gaol delivery, or superior criminal court of a county pala-

time, or great sessions, at which the trial is to be, then and there to prosecute or give evidence against the party charged, *and every such coroner shall certify and subscribe the same evidence*, and all such recognizances, and also the inquisition before him taken and shall deliver the same to the proper officer of the court in which the trial is to be, before or at the opening of the court." It will be observed that the principal alterations enacted by the latter statute are, that the coroner is to put in writing the evidence instead of the effect of of the evidence, as directed by the former: and that he is required to subscribe the evidence when taken.

(*c*) *Rex v. Smith, Russ. & Ry. C.C.R. 339. S.C. 2 Stark. N.P.C. 208.* Eleven of the Judges met. Abbot, J., thought the evidence ought not to have been received. Dallas, J., Graham, B., Richards, C. B., and Lord Ellenborough stated that they should have doubted of the admissibility of the evidence, but for the case of *Rex v. Radbourne*, 1 Leach 457.. see *supra* p. 660. n. (*i*)

(*d*) 2 Leach 854.

(*e*) *Rex v. Thornton*, by Holroyd, J., 1 Phil. Ev. 352.

intended that the magistrate, according to his duty, took the deposition in writing, parol evidence of the information is inadmissible, till it is shewn that it was not reduced to writing.(e)

ing to, or varying it.

Although the statute 7 Geo. 4. c. 64. s. 2. has extended the admissibility of depositions, taken before a justice, so as to include those taken on a charge of a misdemeanor, yet as regards high treason, and petty treason, the law remains the same as under the statutes of Philip and Mary, and therefore on an indictment for the former, they continue inadmissible: but the latter being substantially the same offence as murder, they seem admissible, though a conviction cannot be grounded on such an information, if the witness be living, though unable to travel, or kept out of the way by the contrivance of the prisoner, the statute 5 & 6 Edw. 6. c. 11. s. 12. requiring the witnesses, *if living*, to be examined in petty treason, no less than in high treason: but the prisoner may be convicted on such evidence, of the murder, on an indictment for petty treason. (f)

Depositions in cases of treason.

One of the objects of passing these statutes was to enable the Judge and jury before whom the prisoner is tried, to see whether the evidence of the witnesses at the trial is consistent with the account given by them before the committing magistrate; (g) and therefore an information, when judicially and regularly taken, may be used on the part of the prisoner, when the informant gives his evidence at the trial, to contradict his testimony. Thus it was admitted in Lord Stafford's case, (h) that the deposition of a witness, taken before a justice of the peace, might be read at the desire of the prisoner, in order to take off the credit of the witness, by shewing a variance between the deposition and the evidence given in Court, *viva voce*. And not only on the part of the prisoner, but of the crown, depositions may be so used, even for the purpose of impeaching the credit of a witness called for the prosecution. Thus in Oldroyd's case, (i) where the counsel for the crown, by the direction of the Judge, unwillingly called the prisoner's mother, (her name being on the back of the indictment, as having been examined by the grand jury,) and her evidence was in favour of the prisoner, Graham, B., ordered her deposition before the coroner to be read, for the purpose of affecting the credit of her testimony by shewing it's variance from the deposition. And the twelve Judges held, that it was competent for the Judge to do so: and Lord Ellenborough, and Mansfield, C. J., thought the prosecutor also had a right to call for the depositions.

Deposition may be used to contradict witness.

Before depositions can be read against the prisoner, it must be proved by the justice or coroner who took them, or the clerk that wrote them, that they were truly taken. (j)

Depositions before justice of peace, how proved.

Depositions are also sometimes taken in criminal cases, by the consent of the prosecutor and defendant, when a material witness is about

Depositions upon interrogatories by consent.

(e) *Rex v. Fearshire*, 1 Leach 202.

(f) 1 Phil. Ev. 353. *ante*, p. 665. n.

(i). A bill is now pending in parliament by which it is proposed to be enacted, that petit treason shall be treated in all respects as murder.

(g) See the judgment delivered by

Grose, J., in *Lambe's case*, 2 Leach 558. 1 Phil. Ev. 353.

(h) 3 St. Tr. p. 131. 1 Phil. Ev. 352.

(i) *Russ. & Ry. C. C. R.* 88.

(j) 2 Hale P. C. 52, 284. See *England's case*, 2 Leach 770., as to proof of depositions before coroners.

to leave the country, or resides abroad. (*k*) But if the trial comes on before his departure, or after his return, the depositions cannot be read. (*l*)

Depositions
in India.

Where an indictment or information is exhibited in the King's Bench, for an offence committed in India, the depositions of the witnesses may be obtained under the provisions of the statute 13 Geo. 3. c. 63. s. 40. and 44. This statute enacts, that the Court may award a writ of mandamus to the Judges of the courts in India, as the case may require, for the examination of witnesses, who are to be examined publicly in the Court, upon oath administered according to the form of their several religions; and these depositions duly taken and returned, in the form prescribed by the act, are to be allowed, and deemed as good and competent evidence, as if the witnesses had been sworn at the trial, and examined *vivd voce*.

In cases of offences committed by public servants abroad.

In the case of a prosecution for an offence committed abroad by any person employed in the public service, the depositions of witnesses resident abroad may be obtained in the way pointed out by stat. 42 Geo. 3. c. 85.

(*k*) *Rex v. Morphew*, 2 M. & S. 602. The Court of K. B. allowed them to be read, on an indictment for perjury, by the consent of the defendant. *Anon.* 2 Chitt. 199.
(*l*) *Tidd*. 362.

CHAPTER THE THIRD.

OF WHAT NATURE EVIDENCE MUST BE.—OF PRESUMPTIVE EVIDENCE.—OF THE RULE THAT THE BEST POSSIBLE EVIDENCE MUST BE PRODUCED,—AND OF HEARSAY EVIDENCE.

SECTION I.

Of Presumptive Evidence.

WHEN a fact itself cannot be proved, that which comes nearest to the proof of the fact is, the proof of the circumstances that necessarily or usually attend such facts, and are called presumptions, not proofs, for they stand instead of the proofs till the contrary be proved. (a) In criminal cases, from the secret manner in which guilty actions are generally done, it is seldom possible to give direct evidence of the commission of the offence charged, *i. e.* to produce a witness who saw the act committed; and therefore recourse must necessarily be had to presumptive (or as it is often called, circumstantial) evidence, *i. e.* the direct evidence of circumstances from which the commission of the act may be presumed by the jury. (b) There is no difference between civil and criminal cases, with reference to the modes of proof by direct or circumstantial evidence, except that in the former, where civil rights are ascertained, a less degree of probability may be safely

Presumptive
or circum-
stantial evi-
dence.

(a) Gilb. Ev. 142. As if a man be found suddenly dead in a room, and another be found running out in haste with a bloody sword; this is a violent presumption that he is the murderer: for the blood, the weapon, and the hasty flight, are all the necessary concomitants to such horrid facts; and the next proof to the sight of the fact itself, is the proof of those circumstances that do neces-

sarily attend such fact. *Ibid.*

(b) Presumptions are often divided into three sorts,—violent, probable, and light. Co. Lit. 6 b. 3 Black. Comm. 372. But such a classification seems altogether useless, and the distinction to amount to nothing more, than that in one case the presumptive evidence may be very strong, in another less so, and in another very weak.

adopted as a ground of judgment, than in the latter, which affect life and liberty.(c)

Instances of
presumptions.

One of the most usual presumptions in criminal prosecutions occurs in cases of larceny, where upon proof of the felony having been committed, and of the property stolen having been shortly afterwards found in the possession of the prisoner, it is presumed that he obtained it feloniously, unless he proves how he came by it.(d) So also on an indictment for the crime of arson, proof that property, which was taken out of the house at the time of the firing, was afterwards found secreted in the possession of the prisoner, raises a presumption that the prisoner was present, and concerned in the arson.(e) The buying goods at an under value is said to be presumptive evidence, that the buyer knew they were stolen.(f) Upon an indictment for perjury, in falsely taking the freeholder's oath, at the election of a knight of the shire, in the name of J. W., it appearing by competent evidence, that the freeholder's oath was administered to a person who polled on the second day of the election, by the name of J. W., and who swore to his freehold and place of abode; and that there was no such person, and that defendant voted on the second day, and was no freeholder, and some time afterwards boasted that he had done the trick, and was not paid enough for the job, and was afraid he should be pulled for his bad vote; and it not appearing that more than one false vote was given on the second day's poll, or that the defendant voted in his own name, or in any other than the name of J. W.; it was held, that there was sufficient evidence for the jury to presume that the defendant voted in the name of J. W., and consequently, to find him guilty of the charge as alleged in the indictment.(g)

(c) 1 Phil. Ev. 155. Perhaps strong circumstantial evidence in cases of crimes, committed for the most part in secret, is the most satisfactory of any from whence to draw the conclusion of guilt; for men may be seduced to perjury by many base motives, to which the secret nature of the offence may sometimes afford a temptation; but it can scarcely happen, that many circumstances, especially if they be such over which the accuser could have no control, forming altogether the links of a transaction, should all unfortunately concur to fix the presumption of guilt on an individual, and yet such a conclusion be erroneous. 1 East. P. C. c. 5. s. 9. p. 223.

(d) Where two prisoners were indicted for stealing two horses, and the case against them consisted entirely of evidence to shew, that both the horses were found soon after the robbery, in the joint possession of the prisoners, and it appeared that the horses had been stolen on different days, and at different places;

Littledale, J., compelled the prosecutor to elect on which of the two stealings he would proceed; and his Lordship observed, that the possession of stolen property soon after a robbery is not in itself a felony, though it raises a presumption that the possessor is the thief; it refers to the original taking, with all its circumstances. *Rex v. Smith, Ry. & Mood. N. P. C. 295.* Where the only evidence against the prisoner was, that goods which were stolen sixteen months before, were found in the prisoner's possession, Bailey, J., directed an acquittal, without calling on the prisoner for his defence. *Rex v. —, 1 Carr & P. 459.*

(e) *Rex v. Rickman, 2 East. 1035.*

(f) *Ante*, p. 259.

(g) *Rex v. Price, 6 East. 323.* The following is an example of a case of circumstantial evidence too weak for conviction. Two women were indicted for colouring a shilling and sixpence, and a man (Isaacs) as counselling them, &c. The evidence against him was, that he visited them

A very common presumption is made by a jury in favour of a defendant from the goodness of his character; which subject, together with the presumption as to the intent of a prisoner, or his guilty knowledge, respecting the act which is the subject of the indictment, raised from the proof of prior acts unconnected with it, will be considered in the 4th Chapter of this Book, where the rule as to evidence being confined to the points in issue is discussed. (h)

Besides the presumptions which a jury may make from circumstantial evidence, there are also presumptions of law. Thus, on every charge of murder, the fact of killing being first proved, the law presumes it to have been founded on malice till the contrary appear; and therefore all circumstances alleged by way of justification, excuse, or alleviation, must be proved by the prisoner, unless they arise out of the evidence produced against him. (i) Indeed it is a universal principle, as Lord Ellenborough observed, in the case of *Rex v. Dixon*, (k) that when a man is charged with doing an act, of which the probable consequence may be highly injurious, the intention is an inference of law resulting from the doing the act.

Presumptions
of law.

In the case of *Rex v. Sheppard*, (l) uttering a forged stock receipt to a person who employed the prisoner to buy stock to that amount, and advanced the money, was held sufficient evidence of an intent to defraud that person; and it was further held, that the oath of the person to whom the receipt was uttered, that he believed the prisoner had no such intent, would not repel the presumption of an intention to defraud. So where the prisoner was indicted (under the repealed statute 43 Geo. 3. c. 58.) for setting fire to a mill, with intent to injure the occupiers thereof, it was held, that an injury to the mill being the necessary consequence of setting fire to it, the intent to injure might be inferred; for a

once or twice a-week; that the rattling of copper money was heard whilst he was with them; that once he was counting something just after he came out; that on going to the room just after the apprehension, he resisted being stopped, and jumped over a wall to escape; and that there were then found upon him a bad three-shilling piece, five bad shillings, and five bad sixpences. Upon a case reserved, the Judges thought the evidence too slight to convict him. *Rex v. Isaacs*, MS. Bayley, J., *Ante*, Vol. I. 62. See also *ante*, Vol. I. p. 202. as to presuming consent of parents to a minor's marriage, on a prosecution for bigamy.

(h) So a jury may presume that a man is dead at the expiration of seven years from the time when he was last known to be living. *Per* Lord Ellenborough, in *Doe v. Jesson*, 6 East. 84. See also *Doe v. Deakin*, 4 B. & A. 433. *Doe v. Griffin*, 15 East. 293.

Watson v. King, 1 Stark. 121., as to the presumption of a person's death. See also as to the presumption that a ship never heard of has foundered, *Green v. Brown*, 2 Str. 1199. *Twemlow v. Oswin*, 2 Campb. 85. *Houstan v. Thornton*, Holt 242. *Koster v. Reid*, 6 B. & C. 19. So where a letter, fully and particularly directed to a person at his usual place of residence, is proved to have been put into the post-office, this is equivalent to proof of delivery to the hands of that person; because it is a safe and reasonable presumption that it reaches its destination. *Per* Lord Tenterden, *Walter v. Haynes*, 1 Ry. & Mood. N. P. C. 149.

(i) *Fost*. 255. 1 East. P. C. c. 5. s. 106. p. 340.

(k) 3 M. & S. 15. See also *ante*, p. 353.

(l) *Russ. & Ry. C. C. R.* 169. *Ante*, p. 354.

man must be supposed to intend the necessary consequence of his own act. (m) So in prosecutions for forgery, a jury ought to infer an intent to defraud the person who would have to pay the instrument if it were genuine, although, from the manner of executing the forgery, or from that person's ordinary caution, it would not be likely to impose on him, and although the object was general to defraud whoever might take the instrument, and the intention of defrauding in particular the person who would have to pay the instrument, if genuine, did not enter into the prisoner's contemplation. (n)

In the case of *Rex v. Fuller and Another*, (o) the twelve Judges were of opinion, that the having in possession a large quantity of counterfeit coin unaccounted for, and without any circumstance to induce a belief that the defendants were the makers, was evidence of having procured it with intent to utter it. (p)

Presumption
of innocence.

In general, however, a presumption of law arises in favor of innocence until the contrary is proved; (q) and it arises not only in matters essentially criminal, but in every instance the rule is, that illegality is never to be presumed, but that the presumption always is, that a party complies with the law. (r) So it is a legal maxim, that "*omnia presumuntur esse rite et solenniter acta donec probetur in contrarium*;" and therefore it is a general presumption of law, that a person acting in a public capacity, as a peace officer, justice of the peace, constable, &c. is duly authorised to do so; (s) and that even in a case of murder. (t)

Caution of
Lord Hale as
to presump-
tions.

It may be proper here to mention the two well known cautions of Lord Hale respecting presumptive evidence, viz. 1. That a person should never be convicted for stealing the goods *cujusdam ignoti*, because he cannot give an account of how he came by them, unless there be due proof made that a felony was committed of these goods. 2. That a person should never be convicted of

(m) *Rex v. Farrington*, Russ. & Ry. C. C. R. 207. *Ante*, p. 493.

(n) *Rex v. Mazagora*, Russ. & Ry. C. C. R. 291. *Ante*, p. 354.

(o) *Russ. & Ry. C. C. R. 308. Ante*, Vol. I. p. 47.

(p) See further as to the primary intention, including the collateral one imputed in the indictment, and the necessary proof of the particular intent laid. *Ante*, Vol. I. 590, 598, *et seq.* 2 Stark. Ev. 743.

(q) *Rex v. Twynning*, 2 B. & A. 386., in which case, a woman having married again within the space of twelve months after her husband had left the country, the presumption that she was innocent of bigamy was held to preponderate over the usual presumption of the continuance of life.

(r) *Sissons v. Dixon*, 5 B. & C. 758. See also *Bennet v. Clough*, 1 B. & A. 461., which was an action

against a carrier for losing a parcel, containing some bank notes, stamps, and a letter. For the defendant it was said, that the 42 Geo. 3. c. 81. s. 5. made it illegal to send a letter in a parcel, and that the plaintiff therefore could not recover. But there is a proviso in that section, that it shall not extend to any letter concerning goods, sent by a common carrier of goods, to be delivered with the goods to which it relates; and the Court held, that as illegality is never presumed, the defendant should have given *prima facie* evidence that the letter did not concern the stamps with which it was sent. See also *Rodwell v. Redge*, 1 Carr & P. 220.

(s) *Rex v. Verelst*, 3 Campb. 432. *Gordon's case*, 1 Leach 515. S. C. 1 East. 312, 315.

(t) By Buller, J., in *Berryman v. Wise*, 4 T. R. 366.

murder or manslaughter, unless the fact were proved to be done, or at least the body found dead.(u)

SECTION II.

The best possible Evidence must be produced.

It is a general rule that you must give the best evidence that the nature of the thing is capable of: (a) the true meaning of which rule is, not that in every matter there must be all that force and attestation that by any possibility might have been gathered to prove it, and that nothing under the highest assurance possible shall be given in evidence; but that no such evidence shall be brought that *ex natura rei* supposes still greater evidence behind in the party's possession or power; for such evidence is altogether insufficient, and proves nothing, as it carries a presumption with it contrary to the intention for which it is produced. For if the other greater evidence did not make against the party, why did he not produce it to the Court? As if a man offer a copy of a deed or will where he ought to produce the original, this carries a presumption with it, that there is something more in the deed or will that makes against the party, or else he would have produced it; and, therefore, the proof of a copy in this case is not evidence: (b) but if he prove the original deed or will in the hands of the adverse party, or to be destroyed without his default, a copy will be admitted, because then such copy is the best evidence: the presumption of greater evidence behind in the party's possession being overturned by positive proof.(c)

General rule that best possible evidence must be produced.

Hence it appears that evidence of an inferior quality, or as it is called, secondary evidence, cannot be received until it be shewn that no evidence of a superior quality, or as it is termed primary evidence, can be produced. It becomes necessary, therefore, to consider, 1st. What is primary evidence. 2dly. What is a sufficient ground for the admission of secondary evidence. 3dly. What is good secondary evidence.

1. What is primary evidence. It has already appeared that it is the quality and not the quantity which the rule requiring the best possible evidence regards. Thus if a will of lands is to be proved, the primary proof of the contents is the will itself; and neither an exemplification under the great seal, nor the probate in the spiritual Court will be admissible: (d) but one of the three subscribing witnesses will be sufficient, without calling the others, to prove the execution, if he can speak to all the requisites of attestation, and the jury believe him.(e) So if there are several subscribing witnesses to a deed, and all are proved to be dead, proof

What is primary evidence.

Contents of will.

Execution of will proved by one of three witnesses.

(u) 2 Hale P. C. 290.

(a) Bull. N. P. 293.

(b) Bull. N. P. 293. Gilb. Ev. 13.

(c) Bull. N. P. 293.

(d) Bull. N. P. 246.

(e) Bull. N. P. 264.

Primary evidence of handwriting.

Of disproving handwriting.

Other instances of primary evidence.

Written instruments.

of the signature of one will be sufficient ; for the proof is as far as it goes complete, and not inferior in its kind to any that can be produced.(f) So for the purposes of proving handwriting, where it happens to be a case when there would be no objection to the competency of the writer himself, it is not necessary to call him : it is sufficient to prove it by the evidence of some one acquainted with the general character of his writing, who on inspection can say he believes it to be the handwriting of the party. Thus, where the signature of a magistrate to a deposition is to be proved, it is usually done by a witness acquainted with the general character of his writing, without calling the magistrate himself. The evidence of such a witness is not in its nature inferior or secondary ; and though it may generally be true, that the writer is best acquainted with his own hand-writing, and therefore his evidence will in general be thought the most satisfactory, yet his knowledge is acquired precisely by the same means as the knowledge of other persons, who have been in the habit of seeing him write.(g) And it seems, that on the same principle, the evidence of such persons is as much primary evidence to disprove his hand-writing as to prove it.(h) In *Rex v. Hunt* and others, on an indictment for unlawfully assembling, it was held, that a paper which had been delivered by Hunt to the witness at a meeting, as a copy of certain resolutions about to be proposed and read, and which corresponded with what the witness heard read from a written paper, was admissible as evidence of those resolutions, without giving the defendant notice to produce the original.(i) And in the same case it was decided that parol evidence of inscriptions or devices on banners and flags displayed at the meeting was admissible without producing the originals, though it appeared that they had been seized by the police officers, and therefore might have been produced on the part of the prosecution.(j)

The contents of a written instrument can only be proved by the instrument itself, unless it be lost, or in the hands of the other party : not even the declarations of the party against whom it is to be proved are admissible for this purpose, unless the non-production of the instrument be accounted for.(k) And generally speaking, parol evidence is secondary in its nature to written evidence : and where a written instrument is required by law, or made by private compact to express the intention of the parties, it possesses a force and authority superior to any other evidence.(l) Thus when an agreement has been reduced into writing, the writing itself must be produced ;(m) and, if not properly stamped, the

(f) 1 Phill. Ev. 209.

(g) 1 Phill. Ev. 212. *Ante*, p. 379.

(h) *Ante*, p. 378, 379.

(i) 3 B. & A. 566. *Ante*, Vol. I. p. 268.

(j) *Ibid.* Abbott, C. J., said, " If we were to hold that what was inscribed on a banner could not be proved without the production of the banner, I do not know upon what reason the witness should be allowed to mention the colour of

" the banner, or even to say he saw the banner displayed ; for the banner itself may be said to be the best possible evidence of its existence and of its colour."

(k) *Bloxam v. Elsie*, 1 Ry. & Mood. N. P. C. 187. by Abbott, C. J.

(l) 1 Stark. Ev. 394.

(m) *Brewer v. Palmer*, 3 Esp. 213. *cor.* Lord Eldon, C. J. *Sinclair v. Stevenson*, 1 Carr. & P. 582. *cor.* Best, C. J.

plaintiff must be nonsuited. But, in many instances, the mere existence of written evidence will not exclude independent parol evidence to prove the same fact. Thus, where upon letting premises to a tenant, a memorandum of agreement was drawn up, the terms of which were read over and assented to by him, and it was then agreed that he should on a future day bring a surety and sign the agreement, it was held, that the existence of this memorandum did not preclude parol evidence of the terms of the letting.(n) So where a verbal contract is made for the sale of goods, and it is put into writing afterwards by the vendor's agent, for the purpose of assisting his recollection, but not signed by the vendor, the terms of the contract may be given in evidence on the part of the vendor, without producing the writing.(o) Where a party paying money has taken a receipt, the circumstance of the payment having been acknowledged in writing does not make such writing exclusively primary evidence of the fact; but he may shew the payment by a person who saw the money paid, or by the admission of the other party to that effect.(p) If several persons be witnesses of the same fact, and one of them to assist his memory makes a memorandum of it, this circumstance would not exclude the testimony of the other witnesses.(q) So though an entry of a marriage may have been made in the parish register according to the marriage act, such entry does not become the only primary evidence of the marriage, but it may also be proved by any one who witnessed it; and, indeed, in all cases, except actions for criminal conversation, and indictments for bigamy, by reputation.(r) Where in order to prove a demand, for the purpose of bringing an action of trover for a lease, a witness stated that he had verbally required the defendant to deliver up the lease, and at the same time served a notice in writing on him to the same effect; Lord Ellenborough held, that the written notice need not be produced: for the notices being concurrent and independent, either might be proved as evidence of the conversion.(s)

Parol evidence not always secondary to written.

The above are instances of modes of proof, which, notwithstanding the existence of other evidence which might be more satisfactory, are yet in their nature primary, and consequently available. It may be useful to mention also, some examples of what

Instances of what is not the best possible evidence.

(n) *Doe v. Cartwright*, 3 B. & A. 326. See also *Wilson v. Bowie*, 1 Carr. & P. 8.

(o) *Dalison v. Stark*, 4 Esp. 163.

(p) *Rambert v. Cohen*, 4 Esp. 213. 1 East. 460. *Jacob v. Lindsay*. And if the receipt were on unstamped paper, it may be used by a witness, who saw it given, to refresh his memory, 4 Esp. 213.

(q) 1 Stark. Ev. 394. So in Laver's case for high treason, Mr. Stanly, an under secretary of state, gave evidence of L.'s confessions, upon his examination before the council, which though taken in writing was not produced. 12 Vin. Abr. 96. tit. Evidence, A. b. 623. pl. 7.

(r) *Morris v. Miller*, 1 W. Bl. 632. It may also be observed that in order to make the production of the writing necessary, it must appear to relate to the matter in question. Thus where parol evidence is offered to prove a tenancy, it is not a valid objection, that there is some written agreement relative to the holding, unless it should also appear that it was made between the parties as landlord and tenant, and that it continues in force to the very time to which the parol evidence applies. *Doe v. Morris*, 12 East. 237. *Doe v. Pearson*, 12 East. 239 n. *Rosc. Ev.* 6.

(s) *Smith v. Young*, 1 Campb. 439.

Insurance.

Matters of record.
Acts of a Court.Commence-
ment of prosecution.Examination
before a magistrate.Negative proof
of notice.

is not the best possible evidence, and therefore inadmissible. Upon an indictment for having set fire to a house, with intent to defraud an insurance company, the policy is the best evidence to prove that the house was insured, and an entry to that effect in the books of the insurance office is but secondary evidence. (*t*) To prove the oaths required by the toleration act, parol evidence was held secondary, and inadmissible: because they were matters of record in the court where they were sworn. (*u*) Courts of record speak by means of their records only; and, therefore, the acts of a Court can be proved in no other manner. Thus, parol evidence is inadmissible to shew the day on which a trial at nisi prius took place; for it should be proved by the production of the nisi prius record. (*v*) So, if it be necessary to prove that a trial took place, as in the case of a prosecution for perjury committed on the trial of a cause at nisi prius, that cannot be done by parol evidence, but the record should be produced; or at least, the *postea*. (*w*) And even where the transactions of courts, which are not technically speaking, of record, are to be proved, if such courts preserve written memorials of their proceedings, those memorials are the only authentic means of proof which the law recognizes. (*x*) On an indictment on the 8 & 9 W. 3. c. 26. (for high treason by having a mint die in possession) it is incumbent on the prosecutor to shew, that the prosecution was commenced within three months; and parol evidence that the prisoner was apprehended for treason respecting the coin within three months, (the offence appearing to have been committed above three months before the indictment preferred) was held by the twelve Judges to be insufficient, the warrant to apprehend, or to commit, not being produced. (*y*) Parol evidence is not admissible of the declaration of a prisoner before a magistrate, where the examination has, conformably to the statute, been taken in writing. (*z*) In the case of *Williams v. the East India Company*, (*a*) the question was, whether the agent of the defendants, who were the freighters of the plaintiff's ship, had apprized the plaintiff or his officers of the inflammable and dangerous nature of a quantity of Roghan, which had been stored in the ship, and which ultimately occasioned its destruction. It was the duty of the conductor of military stores to convey goods on board the ship, and of the chief mate to receive them: the chief mate was dead, and no evidence was given of what passed between him and the conductor of the stores; but the captain and second mate proved that no communication had been made to them. Upon this evidence, the plaintiff who, it was held, was bound to prove the negative, was nonsuited by Lord Ellenborough, on the ground that the best evidence possible

(*t*) *Rex v. Doran*, 1 Esp. 127. *Ante*, 496. And therefore if the policy cannot be received in evidence for want of a proper stamp, the indictment cannot be supported, *Rex v. Gilson*, Russ. & Ry. C. C. R. 138. *Ante*, p. 496.

(*u*) *Rex v. Hube*, Peake N. P. C. 132. *Ante*, Vol. I. p. 281.

(*v*) *Thomas v. Ansley*, 6 Esp. 80.,

by Lord Ellenborough. *Rex v. Page*, 6 Esp. 83., by Lord Kenyon. *Tidd. Prac.* 869.

(*w*) *Ante*, p. 549.

(*x*) 3 Stark. Ev. 1043.

(*y*) *Rex v. Phillips and another*, Russ. & Ry. C. C. R. 369.

(*z*) See *ante*, p. 656.

(*a*) 3 East. 192.

of the want of notice had not been produced, *viz.* the evidence of the conductor of stores. The Court afterwards affirmed the nonsuit, and Lord Ellenborough, in delivering their opinion, said, "The best evidence should have been given of which the nature of the case was capable. The best evidence was to have been had, by calling, in the first instance, upon the persons immediately and officially employed in the delivering, and in the receiving of the goods on board, who appear in this case to have been the first mate, on the one side, and the military conductor, the defendant's officer, on the other; and though the one of these persons, the mate, was dead, that did not warrant the plaintiff in resorting to an inferior and secondary species of testimony, (namely, the presumption and inference arising from a non-communication to the other persons on board,) as long as the military conductor, the other living witness, immediately and primarily concerned in the transaction of shipping the goods on board, could be resorted to; and no impossibility of resorting to this evidence, the proper and primary evidence on the subject, is suggested to exist in this case." In a case before Mr. Justice Lawrence, on an indictment on the statute 42 Geo. 3. c. 107. s. 1. (repealed by stat. 7 & 8 Geo. 4. c. 27.) which made it felony to course deer on an enclosed ground, without the consent of the owner of the deer, that learned Judge thought it necessary to call the owner of the deer, for the purpose of disproving his consent; and the owner not being called, the jury were directed to find a verdict of acquittal. (y) But this decision has been overruled by subsequent authorities of the greatest weight: and the rule may now be considered settled, that in cases where it is necessary to prove the non-consent of the owner of the property which is the subject of the charge in the indictment, the testimony of the owner himself is not exclusively primary evidence of the non-consent; but it may be inferred from the conduct of the prisoner, and the circumstances under which the act was done. In the case of *Rex v. Hazy and Collins*, (z) the prisoners were indicted on the stat. 6 Geo. 3. c. 36. (repealed and re-enacted with alterations by stat. 7 & 8 Geo. 4. c. 27 & 30.) for lopping and topping an ash timber tree, "without the consent of the owner." The owner, Sir J. Aubrey, had died before the trial. The offence was committed at eleven o'clock at night, on the 18th of February. Sir J. Aubrey died on the first of March following, having given orders for apprehending the prisoners on suspicion. The land steward was called to prove, that he himself never gave any consent; and, from all he had heard his master say, he believed that he never did. Bayley, J., told the jury, that they must be perfectly satisfied that the prisoners had not obtained the consent of the owner of the tree, (namely, Sir J. Aubrey,) that they might lop and top it; and left it to them to say, whether they thought there was reasonable evidence to shew that in fact he had not given any such permission. His Lordship adverted to the time of night when the offence was committed, and to the circumstance of the prisoner's running away when detected, as evi-

Negative
proof of con-
sent.

(y) *Rex v. Rogers*, 2 Campb. 654.

(z) 2 Carr. & P. 458.

dence to shew, that the consent required had not in fact been given. And in three cases, reserved at once for the opinion of the twelve Judges, it was held, that though there must be some evidence to negative the owner's consent, his non-consent may be inferred from the circumstances, or proved by his agents. The first of the three cases was, *Rex v. Allen*, an indictment for killing a fallow deer in the park of the forest of Waltham, without the consent of the owner, the King; the second, *Rex v. Argent*, for entering a yard adjoining and belonging to the dwelling house of John Greenwood, a quaker, and taking fish out of a pond there without the consent of the owner; and the third, *Rex v. Chamberlain*, for taking fish in Claremont Park belonging to Prince Leopold, without his consent. The offence in each case was committed under circumstances which the learned Judge who tried it thought quite sufficient to warrant the jury in finding the non-consent of the owner, admitting the onus of proving such non-consent to lie on the prosecutor: but in consequence of the decision in *Rex v. Rogers*, above-mentioned, further evidence was gone into, by calling the persons engaged in the management of the property, but not the owners. The Judges held the conviction in each of the cases right. (a)

2. What is sufficient ground for the admission of secondary evidence.

Where the primary evidence is lost.

What is sufficient proof of loss.

2dly, What is a sufficient ground for the admission of secondary evidence. If the primary evidence be lost or destroyed, or if it be in the hands of the adverse party, then upon proof of the loss or destruction in the former case, and of the fact of its being in such possession, and of reasonable notice to produce it at the trial having been given to the other party, in the latter case, secondary evidence is admissible. (b) Where secondary evidence is offered, in consequence of the loss of the primary evidence, in order to establish such loss, it must be proved that diligent search has been made in those quarters from which the primary evidence was likely to be procured. The case of *Kennington v. Inglis*, (c) affords an example of what is considered a sufficient search for such

(a) Ry. & Mood. C. C. R. 156.

(b) Besides these two instances, of the loss or destruction of the primary evidence, and it's being in the hands of the adverse party, it should seem that secondary evidence is admissible in all cases where it is apparent that such secondary evidence is the best, which the party, without any default, has it in his power to produce: for then the presumption of a fraudulent suppression of the better evidence, which is the foundation of the rule, must cease. Thus, if an attesting witness to a written instrument, after his attestation, becomes incompetent from interest, proof of his handwriting is admissible, *Godfrey v. Norris*, 1 Stra. 34. So if he becomes incompetent from infamy, *Jones v. Mason*, 2 Stra. 833. *Ante*, p. 597. The defendant, in an action of trespass for breaking hatches, offered in evi-

dence articles of agreement, dated in 1745, between persons standing in the respective situations of the plaintiff and defendant. To produce this deed, the defendant's attorney was called, who said, he had received it from the son of the owner of the defendant's land. This evidence was objected to as insufficient; then the son of the owner was called, who said he had received it from his father that morning; this being also objected to, the father was called; upon which the plaintiff examined him upon the *voire dire*, and objected that he could not be a witness, being interested; whereupon *Holroyd, J.*, held, that as the father was objected to, the next best evidence had been given, and admitted the deed, *Card v. Jeans*, *Dorchester*, 11th March, 1819, *Manning's Dig.* 375.

(c) 8 East. 273.

a purpose. There it was incumbent on the plaintiff to prove the loss of a licence to trade; and a witness, who had been secretary to the governor of a colony, said it was his practice to destroy, or put aside such licences among the waste papers of his office, as not being of further use, and he supposed he had disposed of the licence in question, (which after having been granted by the governor, was returned to the witness,) in the same manner as other licences for ships whose voyages had been performed: but he was not sure it was destroyed. He further stated, that he had been applied to for the licence, and had searched for it: but he did not recollect whether he found it or not; though he did not think that he had found it. Lord Ellenborough, in delivering the judgment of the Court, (d) said, "We are of opinion, that this evidence satisfies what the law requires in respect of search; and establishes with reasonable certainty, the fact of the licence being lost. It was not to be expected that the witness should be able to speak with more confident certainty to a fact to which his attention would not be particularly drawn at the time, on account of any importance being supposed to belong to it." Another instance of what has been considered a sufficient search to establish a loss, occurs in the case of *Brewster v. Sewell*. (e) There it became necessary to account for the non-production of a policy, and it was proved that it had been effected about seven years before, and having become useless on account of a second policy being effected, it had probably been returned to the plaintiff; and the clerk of the plaintiff's attorney proved, that a few days before the trial of the action, he had searched for it in the plaintiff's house, not only in every place pointed out by the plaintiff, but in every place which he thought likely to contain a paper of this description; it was held that this was sufficient evidence to entitle the plaintiff to give secondary evidence of the contents of the policy. In this case Abbott, C. J., observed, that where the loss or destruction of an instrument may almost be presumed, very slight evidence of its loss or destruction will be sufficient. (f)

But if it be proposed to give secondary evidence of a written instrument, and such instrument is traced into the possession of a particular person, the loss cannot be established without calling him as a witness; for it will not be enough to prove that he was applied to for the instrument, and upon such application, said that he could not find the same, nor did he know where it was. Thus, where it was proved that an indenture of apprenticeship was of two parts, that one had been destroyed, and that the other had come to the hands of a Miss Taylor, who when asked for it, said she could not find it; but she was not subpoenaed: this was held insufficient evidence of the loss. (g) The same principle applies

What is not sufficient proof of loss. Person to whom possession is traced should be called.

(d) 8 East. 289.

(e) 3 B. & A. 296.

(f) See also *Freeman v. Arkell*, 2 B. & C. 494., where Bayley, J., expressed himself to the same effect. And for further examples of sufficient searches, see *Rex v. North Bedburn*, Cald. 452. *Rex v. Johnson*, 7 East.

65. *Rex v. Morton*, 4 M. & S. 48. *Bligh v. Wellesley*, 2 Carr & P. 400. *Rex v. East Farleigh*, 6 D. & R. 147.

(g) *Rex v. Castleton*, 6 T. R. 236. See also *Williams v. Younghusband*, 1 Stark. 139.; and *Parkins v. Cobbett*, 1 Carr & P. 282. But where, in order to establish a settlement by ap-

So should the person who has the legal custody.

Where two parts have been executed.

2. Where the primary evidence is in the possession of the other party.

Possession of privy.

with respect to the person who has the legal custody of an instrument: if it is proposed to establish its loss for the purpose of giving secondary evidence of its contents, the person who has the legal custody of it should be called as a witness, or steps should be taken to make evidence of his conduct admissible.^(e) If two or more parts of a deed have been executed, the loss or destruction of all the parts must be proved, in order to lay a ground for admitting secondary evidence of its contents.^(f)

There is no distinction between criminal and civil cases with respect to secondary evidence of documents in the possession of the defendant. It has been solemnly determined, that notice may be given to the defendant in a criminal prosecution to produce a paper in his possession, and in case he neglects to produce it, other evidence may be given of it.^(g) Where secondary evidence is sought to be given, on the ground that the primary evidence is in the possession of the adverse party, in the first place, the fact of such possession must be proved. The degree of evidence which may be necessary to prove that fact, will depend so much on the nature of the transaction, and the particular circumstances of each individual case, that it is scarcely possible to lay down a general rule on the subject.^(h) Where an original instrument belongs exclusively to a party, or regularly ought to be in his possession according to the course of business, slight evidence is sufficient to raise a presumption that it is in his possession. Thus, where the solicitor to a commission of bankruptcy proved that he had been employed by the defendant to solicit his certificate under the commission, and that on looking at his entry of charges, he had no doubt the certificate was allowed, this was held sufficient proof of the certificate having come to the defendant's possession.⁽ⁱ⁾ Where an instrument has been delivered to a third party, between whom and the party to the suit there exists a privity, the possession of the privy is considered the possession of the party, for the purposes of letting in secondary evidence. Thus, in an action against the owner of a vessel for goods supplied to the use of the vessel, a notice to the defendant to produce the order for

apprenticeship, it was proved that the indenture was only of one part, and that upon application to the pauper, who was then ill, and died soon afterwards, to know what had become of it, he declared that when the indenture expired it was given to him, and he had burnt it long since; and it was also proved, that inquiry was made of the executrix of the master, who said that she knew nothing about it; it was held that this proof was sufficient to let in parol evidence of the contents of the indenture. *Rex v. Morton*, 4 M. & S. 48. The Court distinguished this case from *Rex v. Castleton*, inasmuch as there was no proof that the indenture ever existed in the possession of the pauper, unless his declaration be taken as evidence, and if it was, in

the same breath he declared it no longer existed; whereas the evidence in *Rex v. Castleton* shewed that a further search was necessary. If the individual to whose possession the instrument is traced be dead, an enquiry should be made of his executor, or such persons as must be presumed to have it in their possession. 1 Phil. Ev. 437.

^(e) *Rex v. Stoke Golding*, 1 B. & A. 173.

^(f) Bull. N. P. 254. *Doxon v. Haigh*, 1 Esp. 409.

^(g) *Per Buller, J., Rex v. Watson*, 2 T. R. 201. *Attorney-General v. Le Merchant*, 2 T. R. 201. n. ^(a) *Cates v. Winter*, 3 T. R. 306.

^(h) 1 Phil. Ev. 422.

⁽ⁱ⁾ *Henry v. Leigh*, 3 Campb. 502.

the goods which he had given to the captain, was held sufficient to let plaintiff into secondary evidence of the contents of the order, though the order itself appeared to be in the possession of the captain; on account of the privity between the owner and the captain. (j) So in an action of trover against the sheriff, a notice to the sheriff's attorney was, on account of the privity between him and his under-sheriff, held sufficient to let in secondary evidence of a writ, which was proved to have come to the possession of the under-sheriff, by having been returned to him during the time the sheriff remained in office. (k) So notice to a defendant to produce a check drawn by him, and paid by his banker, is sufficient to entitle the plaintiff to give secondary evidence of its contents, though the check remains in the banker's hands, for the possession of the banker is the possession of his customer. (l)

A letter which had been in the possession of the defendant was proved on the part of the defendant to be then filed in Chancery, pursuant to an order of that Court; Abbott, C. J., was of opinion, that the plaintiff, upon proof of notice to produce, was not entitled to give secondary evidence of the contents; for the letter was as much in the possession of the one party as the other. Either party might, on application to the Court of Chancery, have obtained permission to produce it. (m) But where a document was traced to the possession of the defendant, upon whom notice to produce it had been served, but he proved that it was then in the stamp-office, (where it had been delivered to have some duties allowed,) Best, C. J., held, that as he had not informed the plaintiff of that circumstance when serving the notice, secondary evidence was allowable. (n)

Instrument once in party's possession, but since parted.

After the possession of the primary evidence is proved to be in the adverse party, the party offering secondary evidence must prove that he has given notice to the other side to produce the primary evidence. Such notice may be by parol as well as in writing, and if both a parol and written notice have been given, proof of either is sufficient. (o) It should be properly entitled; (p)

Notice to produce;

it's form.

(j) *Baldney v. Ritchie*, 1 Stark. N. P. C. 338.

(k) *Taplin v. Atty*, 3 Bing. 164.

(l) *Partridge v. Coates*, Ry. & Mood. N. P. C. 156., *per* Abbott, C. J., *S. P. Burton v. Payne*, 2 Carr & P. 520., *per* Bayley, J. See also *Sinclair v. Stevenson*, 1 Carr & P. 584., where Best, C. J., held it was was enough to trace the primary evidence to the possession of an agent. But there is no such privity between the defendant, and a third person under whom he justifies, so as to make proof of the possession of such third party equivalent to the possession of the defendant. *Evans v. Sweet*, 1 Ry. & Mood. N. P. C. 83., *per* Best, C. J. And Lord Kenyon held, on the trial of an information for a libel,

that proof of the delivery of a paper to the servant of the defendant was not proof of the fact of the paper being in the defendant's possession, so as to let in parol evidence of its contents, upon notice to the defendant to produce it. *Rex v. Pearce*, Peake N. P. C. 76.; but see *contra*, *Pritchard v. Symonds*, Bull. N. P. 254. *Rosc. Ev. 4.* and *Colonel Gordon's case*, 1 Leach 300. n. (a) to Aickles's case.

(m) *Williams v. Mundie*, 1 Ry. & Mood. N. P. C. 18.

(n) *Sinclair v. Stevenson*, 1 Carr & P. 582.

(o) *Smith v. Young*, 1 Campb. 440. *Rosc. Ev. 4.*

(p) *Harvey v. Morgan*, 2 Stark. 17. where in an action by the plaintiffs as

and must not be general, but should specify the document to be produced. Thus, a notice "to produce all letters, papers, and documents touching a bill of exchange mentioned in the declaration, and the debt sought to be recovered," was held too vague. (q) So a notice "to produce letters and copies of letters, also all books relating to the cause," was held insufficient to let in secondary evidence of a letter alleged to have been written nine years before. (r) It should also be served in reasonable time. (s) It may be served either on the party himself or his attorney. There is no difference in this respect between criminal and civil cases. (t)

When and upon whom to be served.

Notice to produce, when unnecessary.

Notice to produce is unnecessary, when, from the nature of the proceedings, the party in possession of the instrument has notice that he is charged with the possession of it, as in actions of trover, for bonds or bills of exchange. (u) So on a prosecution for stealing a promissory note or other writing described in the indictment, parol evidence of the contents will be admissible, without any formal notice to the prisoner to produce the original. In Aickles's case, on an indictment for stealing a bill of exchange, all the Judges held, that such evidence had been properly admitted, though it was proved in that case, that the bill had been seen, only a few days before the trial, in a state of negotiation, in the hands of a third person, who had been served with a subpoena, and did not appear: (v) and if it had been proved to have been in the custody of the prisoner, parol evidence might have been given of its contents without notice to produce. (w) So in Spragge's case, who was tried before Buller, J., on an indictment for forging a note, which the prisoner afterwards got possession of and swallowed, parol evidence was permitted to be given of the contents of the note, though no notice to produce it had been given. (x) In Lyster's case, (y) on an indictment for high treason, where it was proved, that the prisoner had shewn a person the paper, containing the treasonable matter laid in the indictment, and then immediately put it into his pocket, that person was permitted to give parol evidence of the contents of the paper. And in the case of De la Motte, (z) on an indictment for a traitorous correspondence with the French government, where the question was, whether examined copies of the treasonable papers, which had been secretly opened at the post-office, and copied, and then

the assignees of C. v. E., a notice to produce was entitled A. and B., assignees of C. and D. v. E., and held insufficient by Lord Ellenborough, though A. and B. were in fact the assignees of C. and D.

(q) *France v. Lucy, Ry. & Mood. N. P. C. 341.*

(r) *Jones v. Edwards, M'Clel. & Y. 189. Rosc. Ev. 423.*

(s) As to what is considered a reasonable notice, see *Doe v. Grey, 1 Stark. C. 283. Bryan v. Wagstaff, 1 Ry. & Mood. N. P. C. 327. Drabble v. Donner, ibid. 47.*

(t) *The Attorney-General v. Le Merchant, 2 T. R. 203. in note (a) to Rex v. Watson.*

(u) *How v. Hall, 14 East. 274. Scott v. Jones, 4 Taunt. 865. Tidd's Pract. 853. The practice used to be otherwise, per Gibbs, J., 4 Taunt. 868.*

(v) *Aickles's case, 1 Leach 294.*

(w) *1 Leach 297., per Heath, J.*

(x) Cited by Lord Ellenborough in *How v. Hall, 13 East. 276.*

(y) *6 St. Tr. 263.*

(z) *Coram, Buller and Heath, J., 1 East. P. C. c. 2. s. 58. 124.*

forwarded to their place of destination, were admissible in evidence; the Court held, that they might be admitted, after proof that the originals were in the handwriting of the prisoner. So on the trial of an indictment for administering an unlawful oath, it was held that a witness might prove that the prisoner read an oath from a paper, without giving him notice to produce it. (a)

It seems to be the better opinion, that neither party will be allowed, either in an examination in chief, or in a cross-examination, to enquire into the contents of a deed, merely because the opposite party has the original deed in his possession, in Court, at the time of the trial; and that the opposite party may object to parol evidence of the contents on account of his not having received a notice to produce the original. (b)

Necessary though document is in Court.

If upon a notice to the adverse party to produce primary evidence in his possession, he refuses to produce the instruments required, it has been held that no inference is to be drawn from such refusal: but that the only consequence is, that the other party who has done all in his power to supply the best evidence, will be allowed to go into secondary evidence. (c) If the party giving due notice, declines to use the papers when produced, this, though matter of observation, will not make them evidence for the adverse party, (d) though it is otherwise when the papers are inspected. (e) Secondary evidence of papers, to produce which notice has been given, cannot be entered into till the party calling for them has opened his case, before which time there can be no cross-examination as to their contents. (f) Where a party after notice, refuses to produce an agreement, it is to be presumed, as against him, that it is properly stamped. (g)

Consequences of giving notice to produce.

(a) *Rex v. Moors*, 6 East. 419. n. to *Rex v. Nield*. See also *Rex v. Hunt*, 3 B. & A. 566. *Ante*, p. 670. And see the same case as to proving inscriptions on banners, &c. without notice to produce, *ante*, p. 670. So the principle of the rule requiring notice to produce does not extend to a case where a party to the suit has fraudulently got possession of a written instrument belonging to a third person; as where a witness was called on the part of the defendant, to produce a letter written to him by the plaintiff, and it appeared that, after the commencement of the action, he had given it to the plaintiff; in this case, though a notice to produce had not been given, parol evidence was admitted, because the paper belonged to the witness, and had been secreted in fraud of the subpoena, *Leeds v. Cook*, 4 Esp. N. P. C. 256. *Tidd. Pr.* 853.

(b) 1 Phil. Ev. 425. 1 Stark. Ev. 362. And see *Doe v. Grey*, 1 Stark. 283. *Doe v. Harvey*, 4 Burr. 2484. *Rosc. Ev.* 3.

(c) *Cooper and another v. Gibbons*, 3 Campb. 363. That was an action

for the value of a pipe of wine; notice had been given by the defendant to the plaintiffs to produce their books, but they were not produced. It was insisted for the defendant, that the jury were bound to draw an inference against the plaintiffs from such non-production. But *Gibbs, C. J.*, said, "I have considered this subject a good deal, and I am of opinion, that the jury are not authorised to draw any such inference from the circumstance relied on. The non-production of the plaintiffs' books, after a notice to produce them, merely entitles the defendants to give parol evidence of their contents."

(d) *Sayer v. Kitchen*, 1 Esp. N. P. C. 210.

(e) *Wharam v. Routledge*, 5 Esp. N. P. C. 235. *Rosc. Ev.* 4. S. P. if they are at all material to the case, *Wilson v. Bowie*, 1 Carr & P. 10. *cor. Park, J.*

(f) *Graham v. Dyster*, 2 Stark. 23. *Rosc. Ev.* 4.

(g) *Crisp v. Anderson*, 1 Stark. N. P. C. 35., but the party refusing is at liberty to prove the contrary, *Ibid.*

3. What is good secondary evidence.

Of a deed :
Original instrument must be proved to have been duly executed.

Of a letter.

Of a licence to trade.

Of an affidavit of ownership of ship.

Of lost agreement, &c. by unstamped counterpart.

Cases where the rule is relaxed.
Public books.

3. It remains to be considered what is good secondary evidence. *(h)* It must be observed, that previous to giving any such evidence of the contents of a deed, the original deed ought to be proved to have been duly executed. *(i)* So where an original note of hand is lost, a copy cannot be read in evidence, unless the note is first proved to be genuine. *(j)* The next best secondary evidence of a deed is a counterpart, if in existence ; *(k)* if there be no counterpart, an examined copy ; if no examined copy, parol evidence. *(l)* The evidence of any one who recollects the contents of a letter, is good secondary evidence of them, although it is in the party's power to produce the clerk who wrote the letter. *(m)* If it be necessary to prove the contents of a licence to trade granted from the crown, proof of its loss is not enough to let in parol evidence of them, because there must be some register of it at the secretary of state's office, and that register would be better than parol evidence. *(n)* So where it was proposed to prove that defendant was owner of a ship, by means of his affidavit, sworn for the purpose of obtaining a certificate of register ; and a proper ground for the reception of secondary evidence had been laid ; Lord Ellenborough held, that an entry in the register book at the custom house, stating that the certificate had been granted on an affidavit of the defendant that he was owner, was not admissible as secondary evidence. The collector's clerk, or some person who had seen the affidavit, and knew that it was made by the defendant, ought to have been called. *(o)* Where there are two parts of a written agreement, both executed at the same time, the one stamped and the other unstamped, the unstamped part is admissible as secondary evidence of the contents of the stamped part. *(p)* So where there was a properly stamped agreement under seal, and a counterpart of it unstamped, and the plaintiff proved the loss of the deed itself, and proposed to read a draft copy in evidence ; it was held that the counterpart, which was produced after notice by the defendant, ought to be read as the best secondary evidence of the contents of the lost deed. *(q)*

There are some particular cases, where the rule that the best possible evidence must be produced has been relaxed. Where it is necessary to prove an entry in a public book, the original book need not be shewn : but from a principle of general convenience,

(h) When secondary evidence is let in, it is subject to the same rules as the best evidence which the case admits of: the evidence as to the contents of written instruments, when they cannot be produced themselves, must be of a nature which the law would receive in other instances. *Per* Lord Ellenborough in *Fisher v. Samuda*, 1 Campb. 193.

(i) Bull. N. P. 254. *Rex v. Culpepper*, Skin. 673.

(j) By Lord Hardwicke, C. J., in *Goodier v. Lake*, 1 Atk. 246.

(k) Bull. N. P. 254. And see the judgment of Best, C. J., in *Munn v.*

Godbold, 3 Bing. 294.

(l) 1 Phil. Ev. 438.

(m) *Liebman v. Pooley*, 1 Stark. N. P. C. 167., by Lord Ellenborough. But a copy of the original copy of a letter, is not good secondary evidence, *Ibid.*

(n) *Rhind v. Wilkinson*, 2 Taunt. 257. *Eyre v. Palsgrave*, 2 Campb. 605.

(o) *Teed v. Martin*, 4 Campb. 90.

(p) *Waller v. Horsfall*, 1 Campb. 501.

(q) *Munn v. Godbold*, 3 Bing. 292. See also *Garnons v. Swift*, 1 Taunt. 507.

an examined copy will be admitted.(u) The post-office marks in town or country, proved to be such, are evidence that the letters, on which they are, were in the office to which those marks belong at the dates those marks specify:(r) but a mark of double postage on such a letter is not in itself evidence that the letter contained an enclosure,(s) and it has been held that the post-mark is not evidence for the purpose of proving that the letter was put into the post-office at the place mentioned by such post-mark.(t) The muster books of the King's ships, documented in the Navy office, to which returns are regularly made, by the commanders, of the names, &c. of their respective crews, may be admitted as evidence of the persons therein named having served on board the several ships in the capacity there mentioned.(k) So in the case of all peace officers, justices of the peace, constables, &c., it is sufficient to prove that they acted in these characters, without producing their appointments;(u) and that even in a case of murder.(v) A witness may be examined on the *voire dire*, as to the contents of a written instrument, without notice having been given to produce it.(w) And where a witness is cross-examined for the purpose of impeaching his credit, such cross-examination is sometimes allowed to be conducted without regard to the rule under consideration. Thus an accomplice or other witness, who appears for the crown on a criminal prosecution, is often asked on the part of the prisoner, without any objection, whether he has not himself been tried for some offence, although, if the rule were strictly applied, that fact could only be proved by the best possible evidence, *vis.* the record.(x) So it has been argued by a very eminent writer, that a witness may be asked, on cross-examination, for the purpose of trying his credit and veracity, whether he has not given an account in a letter different from his present testimony; without regard to the objection, that the letter itself is the best evidence, and therefore the parol evidence of the witness inadmissible:(y) for the general rule, that the best evidence is to be produced which the nature of the thing admits, is to be understood as applying only to the proof of the issue, or of some fact material to the issue.(z)

Post-office marks.

Muster books.

Persons acting in a public capacity.

On the *voire dire*.

On cross-examination to impeach a witness's credit.

Rule applied only to proof of the issue, or of some fact material to the issue.

(u) 1 Phil. Ev. 215.

(r) *Rex v. Plumer*, Russ. & Ry. C. C. R. 264. *Ante*, Vol. I. p. 241.

(s) *Ibid.*

(t) *Rex v. Watson*, 1 Campb. 215. *Ante*, Vol. I. p. 240. and *Fletcher v. Braddyll*, 3 Stark. N. P. C. 64.

(k) *Ante*, p. 443. *Rhodes's case*, 1 Leach 24. And see *Aickles's case*, 1 Leach 391. where it was held that the

daily book of a prison is good evidence to prove the time of a prisoner's discharge.

(u) 1 Phil. Ev. 215. *Ante*, p. 668.

(v) By Buller, J., in *Berryman v. Wise*, 4 T. R. 366.

(w) *Ante*, p. 608.

(x) *Ante*, p. 629.

(y) 1 Phil. Ev. 286.

(z) *Ibid.*

SECTION III.

Of Hearsay Evidence.

General rule
that hearsay
evidence is
inadmissible.

There is no rule in the law of evidence more important or more frequently applied than the general one, that hearsay evidence of a fact is not admissible. If any fact is to be substantiated against a person, it ought to be proved in his presence by the testimony of a witness sworn to speak the truth: and the reason of the rule is, that evidence ought to be given under the sanction of an oath, and that the person who is to be affected by the evidence may have an opportunity of interrogating the witness as to his means of knowledge, and concerning all the particulars of his statement. (a) There are, however, certain instances, which it will be the object of this section to point out, where hearsay evidence is admissible, because either the objection does not apply, or, from the necessity of the case, the rule is relaxed.

Hearsay part
of the trans-
action, or *res*
gestæ.

When hearsay is introduced, not as a medium of proof in order to establish a distinct fact, but as being in itself a part of the transaction in question, it is then admissible; for to exclude it might be to exclude the only evidence of which the nature of the case is capable. (b) Thus in Lord George Gordon's case, on a prosecution for high treason, it was held that the cry of the mob might be received in evidence as part of the transaction. (c) In an action by a husband and wife for wounding the wife, Lord C. J. Holt allowed what the wife said immediately upon the hurt received, and before she had time to devise any thing for her own advantage, to be given in evidence as part of the *res gestæ*. (d) And Lawrence, J., said, in *Aveson v. Lord Kinnaird*, (e) that it is in every day's experience, in actions of assault, that what a man has said of himself to his surgeon is evidence, to shew what he suffered by the assault. Enquiries of patients by medical men, with the answers to them, are evidence of the state of health of the patients at the time; and what were the symptoms, what the conduct of the parties themselves at the time, are always received in evidence upon such enquiries, and must be resorted to from the very nature of the thing. (f) So on a prosecution for a rape, it has been held, that the prosecutor may prove that the woman made a complaint against the prisoner recently after the injury: (g) as it has also been considered allowable, on an indictment for an assault on an infant of five years old, with intent to ravish her, to give evi-

(a) 1 Phil. Ev. 218.

(b) Rosc. Ev. 17.

(c) 21 How. St. Tr. 535.

(d) *Thompson v. Trevannion*, Skinn. 402. cited by Lord Ellenborough, C. J. in *Aveson v. Lord Kinnaird*, 6 East.

193.

(e) 6 East. 193.

(f) By Lord Ellenborough, 6 East.

195.

(g) *Rex v. Clarke*, 2 Stark. N. P. C. 242.

dence of the child's having complained of the injury recently after it was received. *(h)* On a charge of larceny, where the proof against the prisoner is that the stolen property was found in his possession, it would be competent to shew on behalf of the prisoner, that a third person left the property in his care, saying he would call for it again afterwards: for it is material in such a case to enquire under what circumstances the prisoner first had possession of the property. *(i)*

If there has been a previous criminal prosecution between the same parties, and the point in issue was the same, the testimony of a deceased witness given upon oath at the former trial is admissible on the subsequent trial, and may be proved by one who heard him give evidence; *(j)* but the witness must speak to the very words, and not merely swear to the effect of them. *(k)* "He ought," said Lord Kenyon, "to recollect the very words; for the jury alone can judge of the effect of words." *(l)* In what cases the depositions of a witness before a committing magistrate may be read in evidence at the trial, has already been considered in the second section of the second chapter of this book. *(m)*

Testimony of deceased witness at a former trial.

Depositions.

Besides the usual evidence of guilt in general cases of felony, there is one kind of evidence peculiar to the case of homicide; which is the declaration of the deceased after the mortal blow as to the fact itself, and the party by whom it was committed. *(n)* The general principle on which this species of evidence is admitted is, that they are declarations made in extremity, when the party is at the point of death, and when every hope in this world is gone: when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth: a situation so solemn, and so awful, is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice. *(o)* It is therefore evident, that declarations, though proved to have been made by a person in a dying state, are not admissible, unless it also appears that the deceased himself apprehended that he was in such a state of mortality, as would inevitably oblige him soon to answer before his Maker for the truth or falsehood of his assertions. *(p)*

Dying declarations.

Deceased must be conscious of approaching death.

Upon the trial of Henry Welbourn *(q)* for the murder of Elizabeth Page by poison, a witness deposed that the deceased and

Welbourn's case.

(h) 1 East. P. C. c. 10. s. 5. p. 444. *Ante*, Vol. I. p. 565. But the particulars of the complaint, stated by her on the former occasion, are clearly not admissible as evidence of the truth of her statement. 1 Phil. Ev. 222.

(i) 1 Phil. Ev. 223.

(j) *Rex v. Carpenter*, 2 Show. 47. 2 Hawk. P. C. c. 46. s. 29. 1 Phil. Ev. 219. and Mr. Starkie's note to *Rex v. Smith*, in the second volume of his Reports, p. 211.

(k) Lord Palmerston's case, cited by Lord Kenyon in *Rex v. Jolliffe*, 4 T. R. 290.

(l) *Ennis v. Donisthorpe*, MS. 1 Phil.

Ev. 219. By this it is conceived his Lordship meant, not that the witness's testimony would go for nothing, unless he could swear positively they were the very words used by the deceased, and no other: but that the present witness ought to say, "To the best of my recollection these were the very words used."

(m) *Ante*, p. 660.

(n) 1 East. P. C. c. 5. s. 124. p. 353.

(o) Per Eyre, C. B., in Woodcock's case, 1 Leach 502.

(p) Per Eyre, C. B., *ibid*.

(q) 1 East. P. C. c. 5. s. 124. p. 353.

the prisoner lived with her as her servants; that perceiving the deceased alter and appear very ill, she taxed her with being with child, which she owned, and the next day continuing very ill, she confessed she had taken something; at which time the witness believed that the deceased was sensible of her situation and danger, though she did not say so. But when the apothecary came to see her the same evening, she said that she was very bad, and did not know if she should get the better of it. The apothecary himself deposed, that when he first saw the deceased she was then apparently dying; but he believed that she was not sensible of her danger; that after he had been with her some time he made her sensible of her danger, in order that he might get from her what she had done. She desired him to give her something to ease her pain. He told her he must first know what she had done; and that she would not live twenty-four hours unless proper relief were afforded (she did not in fact live above an hour afterwards.) The witness had no other reason for thinking that she knew her danger from any thing that she said, except that on his telling her of her danger, she told him what was the cause, which she had before refused to do. She then described to him the symptoms of pain which she had felt, and again repeated that she wished he would give her something to compose her. The witness then again urged the necessity of knowing the cause of those symptoms, and she told him with reluctance, that she had been three or four months gone with child, and that during the last fortnight she had been constantly prevailed upon to take bitter apple in order to procure an abortion; but that not producing the desired effect, the person had prevailed on her to take a white powder, (which was the day before she was taken ill,) and that the symptoms came on in about three or four hours after. The witness then urged her to say by whom she had been prevailed upon, when with increased reluctance and hesitation she told him, it was by her fellow-servant Welbourn; and that he had prevailed upon her by assuring her that there was no crime in procuring an abortion whilst the child was so young. At this moment she was free from pain, and the witness thought that a mortification had taken place. From the deceased's description of the white powder, and from the inspection of the body afterwards, the witness believed it to be arsenic. On his cross-examination he said, that at the time she made this declaration he believed that she thought she was getting well, from the being so free from pain. The declaration was received, and the prisoner was found guilty. But a doubt afterwards occurring to the learned Judge, whether, though in the first part of the apothecary's evidence he swore that he made the deceased sensible of her danger before she made the declaration, yet as he afterwards said, that at the time she made the declaration, she believed that she was getting better from the pain ceasing, he should not have rejected the evidence, and directed an acquittal; the prisoner was respited to take the opinion of the Judges on the case. In Michaelmas Term, 1792, a majority of the Judges were of opinion, that it did not sufficiently appear that the deceased knew or thought she was in a dying state when she made the declaration: on the contrary, she had reason to think

that if she told what was the matter with her, she might have relief and recover. But as to what the apothecary had said on his cross-examination, they laid no stress on it, being mere opinion, unwarranted by fact. So in the case of *Rex v. Christie*,^(r) O. B. 1821, the deceased asked his surgeon if the wound was necessarily mortal, and on being told that recovery was just possible, and that there had been an instance where a person had recovered after such a wound, he said, "I am satisfied;" and after this he made a statement: this statement was held by Abbott, C. J., and Park, J., to be inadmissible as a declaration in *articulo mortis*, as it did not appear that the deceased thought himself at the point of death; for, being told that the wound was not necessarily mortal, he might still have had a hope of recovery. The case of *Rex v. Mosley* and another,^(s) very recently decided by the twelve Judges, affords an example of what is such a consciousness of danger as will render a declaration admissible; and further shews, that if it sufficiently appear that such a consciousness existed, it is immaterial that death did not ensue until a considerable time after the declarations were made. The trial took place at the Lent Assizes, 1825, before Mr. Justice Holroyd, upon an indictment for the murder of Jonathan Depledge; and a question arose respecting the admissibility of certain declarations, which were offered and received in evidence, as the dying declarations of the deceased, as to the circumstances attending the commission of the crime, and as to the number of persons by whom he had been attacked. The injury that caused the death of the deceased was done to him on Thursday evening, the 30th of September, in consequence of which he was brought home and put to bed, and a surgeon was sent for on that evening to attend him. When the surgeon arrived, the deceased immediately complained to him of great pain in his chest, and particularly of his side, and of great difficulty of breathing. The surgeon continued to attend him until his death, which took place on the evening of the 10th of October following. The surgeon in his evidence said, "I think the deceased did not speak to me of his prospects of dying during that time; I thought his state dangerous; I thought his complaint was of that nature that it might terminate in death. The last day that I saw him, the 10th of October, I was certain that he would die that forenoon; I communicated to him his state, I told him the case was hopeless; I made no communication to him till then; I did not consider the case quite hopeless till then; I always told him there was danger, but I hoped he would be better; I held out hopes to him of his recovery; I do not know whether he entertained hopes or not; he never expressed any opinion either of hope or apprehension to me; I thought there was a probability of his recovering the day before he died; I at first thought the probabilities were against him; I did not communicate that to him." In consequence of this evidence of the surgeon, the learned Judge confined the counsel for the prosecution, in their examination of the witnesses, to inquiries whether any and what declarations were made by the deceased on this sub-

Christie's case.

Mosley's case

^(r) MS. Carr. Cr. L. 202.^(s) 1 Ry. & Mood. C. C. R. 97.

ject, after the time the surgeon made the above communication to him of his hopeless state : but no such subsequent declarations could be proved. This failing, it became material to inquire further as to the prior hopeless state of the deceased, and his consciousness of it from the commencement of, or during his illness, in order to ascertain whether declarations alleged to have been made by him during his illness, but prior to the above communication to him by the surgeon, were admissible in evidence or not. To this point a witness, of the name of Anne Newton, stated, " That she was sent for to the deceased on the evening of the 30th of September, near eight o'clock ; that he was in a very ill state indeed ; that he said he was robbed and killed ; that he should not get the better of it ; that she assisted in putting him to bed, and continued to attend him till his death ; that during that time he spoke of dying, and said he would not continue long, a few days would finish him ; this he said about Tuesday ; that he complained all along he was sure he would not get better ; that he all along said he never would get better ; that he never missed saying so one day before the latter end." This witness also stated, " That the deceased was sixty-eight years of age, and was in a very good state of health considering his years ; that she was a nurse accustomed to attend sick people, and very often found them low spirited, and had known many persons say they should never get better, who have got better ; that the deceased talked in that way ; that about the Tuesday before his death he said he should not continue many days ; that it was before that he told her all about it ; that the first night he said he should not get better, and he continued to say so till the last day." The learned Judge was not disposed to receive on this evidence the declarations of the deceased, made previous to the surgeon's notifying to him his hopeless state as above mentioned ; but on its being intimated that the proof would be otherwise insufficient for the conviction of the prisoners, he allowed them to be given in evidence, and reserved the question as to the propriety of his doing so for the consideration of the Judges. Accordingly evidence was received of the deceased's declarations made by him after he was on the Thursday evening brought home, and had said that he was robbed and killed, and should not get the better of it ; and also at different times afterwards during his illness, and previous to the surgeon's communications to him of his hopeless state, as above-mentioned ; and upon that and other evidence the prisoners were convicted of the murder. The Judges upon considering the case reserved, were unanimously of opinion that the dying declarations of the deceased were properly received in evidence.

The deceased need not express apprehension of danger.

It is not necessary that the deceased should *express* any apprehension of danger ; for his consciousness of approaching death may be inferred, not only from his declaring that he knows his danger, but from the nature of the wound, or state of illness or other circumstances of the case. (t) All the Judges agreed at a

(t) John's case, 1 East. P. C. c. 5. case, 1 Leach 500. Dingler's case, 2 s. 124. p. 358. by the decision of all Leach 561.
the Judges in 1790. Woodcock's

conference in Easter Term, 1790, that it ought not to be left to the jury to say, whether the deceased thought he was dying or not; for that must be decided by the Judge before he receives the evidence. (u)

His consciousness is a question for the judge.

It is a general rule that dying declarations, although made with a full consciousness of approaching death, are only admissible in evidence where the death of the deceased is the subject of the charge, and the circumstances of the death the subject of the dying declaration. (v) In a late case the defendant having been convicted of perjury, a rule nisi for a new trial was obtained: whilst that was pending, the defendant shot the prosecutor; and on shewing cause against the rule, an affidavit was tendered of the dying declaration of the latter, as to the transaction out of which the prosecution for perjury arose. It was held according to the rule above stated that the affidavit could not be read. (w) In the case of *Rex v. Hutchinson*, (x) tried before Bayley, J., the prisoner was indicted for administering savin to a woman pregnant, but not quick with child, with intent to procure abortion. The woman was dead, and for the prosecution, evidence of her dying declaration upon the subject was tendered. The learned Judge rejected the evidence, observing that, although the declaration might relate to the cause of the death, still such declarations were admissible in those cases alone where the death of the party was the subject of enquiry.

Only admissible when the death of deceased is the subject of the charge, and the circumstances of the death the subject of the declaration.

The declaration of a convict at the moment of execution cannot be given in evidence as a dying declaration: for as an attainted convict he could not have been admitted to give testimony upon oath, and the dying declarations of such a person cannot, consistently with the principles of justice, be considered as better evidence than his testimony on oath would have been if he had been alive. (y) The dying declaration of an accomplice is admissible; (z) but this can only happen where the prisoner is charged with assisting in the self-destruction of the accomplice: for it has already appeared that dying declarations are never admis-

Dying declaration of a convict.

Of an accomplice.

(u) *John's case*, 1 East. P. C. s. 124. p. 358. *Welbourn's case*, *Ibid.* 360. S. P. resolved by all the Judges in Mich. Term, 1792. *Rex v. Hucks*, 1 Stark. N. P. C. 523. In *Woodcock's case*, tried in 1789, Eyre, C. B., left it to the jury to consider whether the deceased thought she was dying or not.

(v) By Abbot, C. J.; *Rex v. Mead*, 2 B. & C. 608. In trials for robbery the dying declarations of the party robbed were held inadmissible by Mr. Justice Bayley, on the Northern Spring Circuit, 1822, and by Mr. Justice Best on the Midland Spring Circuit, 1822. In *Rex v. Mead*, *infra*, in the argument for the admissibility of the evidence, the counsel cited the case of *Wright v. Littler*, 3 Burr. 1244., in which evidence of a dying confes-

sion of the subscribing witness to a deed was held admissible, and a case mentioned by Lord Ellenborough, in 6 East. 195., in which Heath, J., received the confession of an attesting witness to a bond, who in his dying moments begged pardon of heaven for having been concerned in forging the bond: Abbott, C. J., remarked that these cases were peculiar, inasmuch as the declarations amounted to a confession by the party themselves of heinous offences which they had committed.

(w) *Rex v. Mead*, 2 B. & C. 605.

(x) 2 B. & C. 608. in note to *Rex v. Mead*.

(y) *Drummond's case*, 1 Leach 337. *cor.* Eyre, B., and Gould, J.

(z) *Margaret Tinkler's case*, 1 East P. C. 354.

sible, except where the death of the person who made them is the subject of the indictment.

A parol dying declaration admissible, though a subsequent one was made and reduced to writing.

It is no objection to the admission of a dying declaration, that the deceased made a subsequent statement to a magistrate, which was taken down in writing, and is not produced. In the case of *Rex v. Reason and Tranter*, (z) three several declarations had been made by the deceased in the course of the same day at the successive intervals of an hour each; the second had been made before a magistrate, and reduced into writing, but the others had not; the original written statement taken before the magistrate, was not produced, and a copy of it was rejected. A question then arose whether the first and third declarations could be received; and Pratt, C. J., was of opinion that they could not, since he considered all three statements as parts of the same narrative, of which the written examination was the best proof: but the other Judges held that the three declarations were three distinct facts, and that the inability to prove the second did not exclude the first and third; and evidence of those declarations was accordingly admitted. (a)

Prisoner in his defence may shew the state of mind or character of the deceased.

As the declarations of a dying man are admitted, on a supposition that in his awful situation on the confines of a future world, he had no motives to misrepresent, but, on the contrary, the strongest motives to speak without disguise and without malice, it necessarily follows, that the party against whom they are produced in evidence, may enter into the particulars of his state of mind and of his behaviour in his last moments, or may be allowed to shew, that the deceased was not of such a character, as was likely to be impressed by a religious sense of his approaching dissolution. (b)

Hearsay in proof of public rights, boundaries of parishes, &c.

Hearsay evidence is also admissible for the purpose of proving public rights and rights in the nature of public rights. (c) Thus in questions concerning the boundary of parishes or manors traditional reputation is evidence; (d) and the declarations of old persons deceased have been admitted in such cases, although they were parishioners and claimed rights of common on the wastes which their evidence had a tendency to enlarge. (e) But although general reputation is evidence on a question of boundary or custom, yet the tradition of a particular fact, (as that turf was dug or a post put down in a particular spot) is not admissible. (f)

(z) 1 Stra. 500. 6 St. Tr. 502. 2 Stark. Ev. 460.

(a) According to the report in the State Trials, the Chief Justice and Mr. Justice Powys, deemed the evidence inadmissible. At all events it appears the evidence was received. Sir John Strange was one of the counsel in the cause.

(b) 1 Phill. Ev. 226.

(c) 1 Rosc. Ev. 16. But to prove prescriptive rights strictly private, it is doubtful whether hearsay evidence is admissible, see 1 Phil. Ev. 238. 1

Stark. Ev. 61. Rosc. Ev. 16.

(d) *Nicholas v. Parker*, 14 East 331. in note to *Outram v. Morewood*.

(e) *Ibid.* But such declarations must not have been made *post litem motam*, that is, after the very same point or question has become the subject of controversy, *Rex v. Cotton*, 3 Campb. 444. 1 Phill. Ev. 237.

(f) *Weeks v. Sparke*, 1 M. & S. 687. *Ireland v. Powell*, Peake Ev. 15. *cor.* *Chambre, J., Chatfield v. Frier*, 1 Price 256.

Declarations or statements made by deceased persons, where they appear to be against their own interests, have in many cases been admitted: as entries in their books charging themselves with the receipt of money on account of a third person, (*g*) or acknowledging the payment of money due to themselves. (*h*) Thus a written memorandum by a deceased man-midwife, stating that he had delivered a woman of a child on a certain day, and referring to his ledger in which a charge for his attendance was marked as paid, was thought by the Court of King's Bench to have been properly received in evidence, upon an issue as to the child's age. (*i*) So where the point in issue was whether a certain waste was the soil of the defendant, entries by a steward, since deceased, of money received by him from different persons in satisfaction of trespasses committed on the waste were admitted in evidence to shew that the right to the soil was in his master, under whom the plaintiff claimed. (*k*) On the same principle, entries in the books of a tradesman by his deceased shopman, who thereby supplies proof of a charge against himself, have been admitted in evidence, as proof of the delivery of the goods, or of other matter there stated within his own knowledge. (*l*) But where the effect of the entry is not to charge the servant, it is not evidence. Thus in an action for the hire of horses, an entry by the plaintiff's servant since dead, stating the terms of the agreement with the defendant, is not evidence. (*n*) In all these cases, the person who made the entry must be proved to be dead: if he be living he ought to be produced as a witness, to explain the circumstances under which the entry was made. (*o*) Where it appeared that an entry was in the handwriting of a banker's clerk who was then in the East Indies, it was held inadmissible. (*p*)

Hearsay of deceased persons making statements against their own interest.

Entries in a tradesman's books by deceased shopman.

Death of person, who made the entry must be proved.

In some cases also the declarations of a person deceased are admitted on the mere ground that he had a peculiar knowledge, and no interest to misrepresent. Thus, though the survey of a manor made by the owner is not evidence against a stranger in favour of a succeeding owner; (*q*) yet where A. seised of the manors of B. and C. causes a survey to be taken of the manor of B. which is afterwards conveyed to E., and after a long time there is a dispute between the lords of the manors of B. and C. about their boundaries, this old survey may be given in evidence. (*r*) So entries by a deceased rector or vicar as to the receipt of ecclesiastical dues are admissible for his suc-

Hearsay of persons having no interest to mis-state.

(*g*) 1 Phil. Ev. 243.

(*h*) *Ibid.*

(*i*) *Higham v. Ridgway*, 10 East. 109. Entries in the land-tax collector's books stating A. B. to be rated for a particular house, and his payment of the sum rated, were held by Abbot, C. J., admissible evidence to show that A. B. was in the occupation of the premises at the time mentioned, *Doe v. Cartwright*, 1 Ry. & Mood. N. P. C. 62.

(*k*) *Barry v. Bebbington*, 4 T. R. 514.

(*l*) 1 Phill. Ev. 250.

(*n*) *Calvert v. Archbishop of Canterbury*, 2 Esp. 646. *Rosc. Ev.* 19.

(*o*) *Cooper v. Marsden*, 1 Esp. 2. by Lord Kenyon.

(*p*) *Ibid.*

(*q*) *Anon.* 1 Stra. 95.

(*r*) *Bridgman v. Jennings*, 1 Lord Raym. 734. *Rosc. Ev.* 18.

cessor on the ground that he had no interest to mis-state the fact. (s)

Other cases
of hearsay.

There are other exceptions to the general rule against the reception of hearsay evidence, such as the admission of declarations in cases of pedigree, and of old leases, rent-rolls, surveys, &c., which can occur so seldom in criminal proceedings, that it is not thought necessary to take further notice of them in this Treatise. (t)

(s) *Le Gross v. Lovemoor*, 2 Gwill.
529. *Armstrong v. Hewit*, 4 Price
218. *Lord Arundel's case*, 2 Gwill.
620. *Pringal v. Nicholson*, Wightw.
63. *Walter v. Holman*, 4 Price 171.

Parsons v. Bellamy, 4 Price 190. 1
Phil. Ev. 247.

(t) See *post.* ch. 4. s. 2. as to evidence of character.

CHAPTER THE FOURTH.

THE PROOF OF NEGATIVE AVERMENTS.—THE RULE THAT THE EVIDENCE MUST BE CONFINED TO THE POINTS IN ISSUE.—WHAT ALLEGATIONS MUST BE PROVED, AND WHAT MAY BE REJECTED;—AND THEREWITH OF SURPLUSAGE AND OF VARIANCE.

SECTION I.

Of the Proof of Negative Averments.

It is a general rule of the law of evidence, in criminal as well as in civil proceedings, that it lies on him who asserts the affirmative of a fact to prove it, and not on him who asserts the negative, unless under peculiar circumstances where the rule does not apply. (a) Thus on an indictment for bigamy, where the first marriage was by licence, and the prisoner appeared to be under age at the time, it was held that it lay on the prosecutor to prove the consent of parents, required by the marriage act, in order to shew the marriage valid, and not on the prisoner to prove the negative in his defence. (b)

General rule that he who asserts the affirmative must prove it.

In criminal proceedings, however, where negative averments usually impute a breach of the law to the defendant, the operation of this rule is sometimes counteracted by the presumption of law in favour of innocence; which presumption, making, as it were, a *prima facie* case in the affirmative for the defendant, drives the prosecutor to prove the negative. (c) Thus on an in-

The presumption of law in favour of innocence sometimes drives the prosecutor to prove the negative averments.

(a) Gilb. Ev. 131. Bull. N. P. 298.

(b) Rex v. Butler, Russ. & Ry. C. C. R. 61. Rex v. Morton, *Ibid.* 19. in note to Rex v. James, *Ante*, vol. I. p. 201.

(c) The same rule applies in civil proceedings. The principal cases on

the subject are, Monke v. Butler, 1 Roll. Rep. 83. 3 East. 199. Rex v. Hawkins, 10 East. 216. Powell v. Milbank, 2 W. Bl. 851. S. C. 3 Wils. 355. Williams v. East India Company, 3 East. 193. Rex v. Twynning, 2 B. & A. 386.

formation against Lord Halifax for refusing to deliver up the rolls of the Auditor of the Exchequer, the Court of Exchequer put the plaintiff upon proving the negative that he did not deliver them: for a person shall be presumed duly to have executed his office till the contrary appear. (d) On an indictment for obtaining money, &c. under false pretences, the prosecutor must prove the averments negating the pretences. In an action for the recovery of penalties under the hawkers' and pedlar's act against a person charged with having sold goods by auction, in a place in which he was not a householder, some proof of this negative, namely of the defendant not being a householder in the place, would be necessary on the part of the plaintiff. (e) On the trial of an indictment on the statute 42 G. 3. c. 107. s. 1., (repealed by stat. 7 & 8 Geo. 4. c. 27.) which makes it felony to course deer on an inclosed ground, "without the consent of the owner of the deer," it ought to appear from the evidence produced on the part of the prosecution, that the owner had not given his consent. (f)

But this presumption does not operate, when the affirmative is peculiarly within the knowledge of the party charged.

Rex v. Turner.

But where the affirmative is peculiarly within the knowledge of the party charged, the presumption of law in favour of innocence is not allowed to operate in the manner just mentioned: but the general rule as above stated applies, *viz.* that he who asserts the affirmative is to prove it, and not he who avers the negative.

Thus upon a conviction under stat. 5 Ann. c. 14. s. 2. against a carrier for having game in his possession, it was held, in the case of *Rex v. Turner*, (g) sufficient that the qualifications mentioned in the stat. 22 & 23 Car. 2. c. 25. were negatived in the information and adjudication, without negating them in evidence. (h) "The question is," said Lord Ellenborough in that case, "upon whom the *onus probandi* lies; whether it lies upon the person who affirms a qualification, to prove the affirmative, or upon the informer who denies any qualification to prove the negative. There are, I think, about ten different heads of qualification enumerated in the statute, to which the proof may be applied; and according to the argument of to-day, every person who lays an information of this sort is bound to give satisfactory evidence before the magistrates to negative the defendant's qualification upon each of those several heads. The argument

(d) Bull. N. P. 298.

(e) 1 Phill. Ev. 185, 186.

(f) *Rex v. Rogers*, 2 Campb. 654. See also *Rex v. Hazy and Collins*, 2 Carr. & P. 458.; and *Rex v. Argent, Ry. & Mood*. C. C. R. 158. *ante*, p. 674., the former of which cases was an indictment for lopping and topping an ash tree, without the consent of the owner, and the latter an indictment for taking fish out of a pond, without the consent of the owner. According to the report of the case of *Rex v. Rogers*, Mr. Justice Lawrence seems to have thought it necessary to call the owner of the deer, for the purpose

of disproving his consent; and the owner not being called, the jury were directed to find a verdict of acquittal. But this decision has been overruled; and it is now established, that the non-consent may be inferred from the circumstances under which the act was done, or proved by the agents of the owner, *ante*, p. 673.

(g) 5 M. & S. 206.

(h) See also *Spieros v. Parker*, 1 T. R. 144. and *Jelfs v. Ballard*, 1 B. & P. 468. by Heath, J. In *Rex v. Stone*, 1 East. 639., the Court of King's Bench were equally divided on the point.

really comes to this, that there would be a moral impossibility of ever convicting upon such an information.”(h)

In the more recent case of *Rex v. Hanson*,⁽ⁱ⁾ the rule was again considered and laid down by the Court of King's Bench. In that case there had been a conviction by two justices for selling ale without an excise licence. The information negatived the defendant's having a licence; but there was no evidence to support this negative averment; the only evidence to support the conviction being that the defendant had in fact sold ale. The question was, whether the informer was bound to give evidence to negative the existence of a licence. In support of the conviction it was contended, that such evidence was unnecessary, and that it lay upon the defendant to prove that he had a licence; for it is a rule, both of the civil and the common law, that a man is not bound to prove a negative allegation; and *Rex v. Turner* was cited as an express authority on the point. Abbott, C. J., said, “I am of opinion, that the conviction is right. It seems to me, that this case is not distinguishable from *Rex v. Turner*. It is a general rule, that the proof of the affirmative lies upon the party who is to sustain it. The prosecutor, in general, is not called upon to prove negatively all that is stated in the information as matter of disqualification. In *Rex v. Turner*, all the learned Judges concur in that principle. I concur in all the observations upon which the judgment of the court in that case was founded; and I think every one of them is applicable in principle to this. The general principle, and the justice of the case, is here against the defendant. It is urged, that if we decide against the defendant, we shall open the door to a great deal of inconvenience; that by no means follows; this man might have produced his licence without any possible inconvenience, which would at once have relieved him from all liability to penalties. Probably the whole inquiry before the magistrates was as to the fact of selling the ale, and that nothing was said about the licence; but, however, I think, by the general rule, the informer was not bound to sustain in evidence the negative averment, that the defendant had not a licence. I do not mean to say that there may not be cases which may be fit to be considered as exceptions to that general rule; there is no general rule to which there may not be exceptions; all I mean to say is, that this is not one of those exceptions. The party thus called upon to answer for an offence against the excise laws, sustains not the slightest inconvenience from the general rule, for he can immediately produce his licence; whereas, if the case is taken the other way, the informer is put to considerable inconvenience. Discussions may arise before the magistrates, whether the evidence produced is proper to sustain the negative; whether a book should be produced, or an examined copy, and many other questions of that sort; whereas none can arise when the defendant himself produces his licence. This, therefore, not being one of the excepted cases, but a case falling directly within the general rule, I am of opinion, that judgment must be

(h) 5 M. & S. 209.

Dowling, p. 45. n. (1)

(i) MS. Paley on Convictions by

given for the crown." Holroyd and Best, Js., concurred. Bayley, J., was absent.(j)

Willis's case.

In Willis's case it is said to have been agreed that, although an indictment states that the prisoner, "then or at any time before not being a contractor with or authorized by the principal officers or commissioners of our said Lord the King, of the navy, ordnance, &c. for the use of our said Lord, the King, to make any stores of war, &c.," yet, that it is not incumbent on the prosecutors to prove this negative averment, but that the defendant must shew, if the truth be so, that he is within the exception in the statute.(k)

Apothecaries' Company v. Bentley.

Upon the same principle a very late case, the Apothecaries Company v. Bentley, (l) was decided. That was an action for a penalty on the statute 55 Geo. 3. c. 194. for practising as an apothecary without having obtained the certificate required by that act. All the counts in the declaration contained the allegation that the defendant did act and practice as an apothecary, &c. *without having obtained such certificate as by the said act is directed.* No evidence was offered by the plaintiffs to shew that the defendant had not obtained his certificate. The plaintiffs having closed their case, the counsel for the defendant submitted that there must be a nonsuit. But Abbott, C. J., said, "I am of opinion that the affirmative must be proved by the defendant. I think that it being a negative, the plaintiffs are not bound to prove it; but that it rests with the defendant to establish his having a certificate."

SECTION II.

Evidence confined to Point in Issue.

Evidence to be confined to point in issue.

No evidence can be admitted which does not tend to prove or disprove the issue joined.(a) In criminal proceedings the necessity is stronger, if possible, than in civil, of strictly enforcing the rule, that the evidence is to be confined to the points in issue; for where a prisoner is charged with an offence, it is of the utmost importance to him, that the facts laid before the jury should consist exclusively of the transaction which forms the subject of the indictment, which alone he can be expected to come prepared to answer. It is, therefore, a general rule, that the facts proved must be strictly relevant to the particular charge; and

Evidence must apply to the single transaction charged.

(j) So in *Rex v. Smith*, 3 Burr. 1475., which was a conviction for trading as a hawker and pedlar without a licence, it was held that the onus of proving the licence lay on the defendant.

(k) 1 Hawk. P. C. c. 89. sect. 17. by the editor, *Ante*, p. 276.

(l) Ry. & Mood. N. P. C. 159. S. C. 1 Carr. & P. 538.

(a) See *ante*, p. 619, 639., with respect to examining a witness as to facts, which are only relevant inasmuch as they tend to shew the witness unworthy of credit.

have no reference to any conduct of the prisoner unconnected with such charge. Therefore, it is not allowable to shew, on the trial of an indictment, that the prisoner has a general disposition to commit the same kind of offence as that for which he stands indicted. Thus, in a prosecution for an infamous crime, an admission by the prisoner, that he had committed such an offence at another time, and with another person, and that he has a tendency to such practices, ought not to be received in evidence. (b) Where upon an indictment for a burglary and stealing goods, the prosecutor failed to prove any nocturnal breaking, or any larceny, subsequent to the time when the prisoners entered the house, which must have been after three o'clock in the afternoon of the day on which the offence was charged to have been committed, it was proposed to abandon the charge of burglary, and to give evidence of a larceny by the prisoners, of some of the articles mentioned in the indictment, though committed before three o'clock on the day on which they were charged to have entered the house; but the Court refused to receive the evidence, on the ground, that it was a distinct transaction. (c) The prisoners were therefore acquitted on this charge; but were afterwards indicted again for the other offence, and convicted. In treason, no overt act amounting to a distinct independent charge, though falling under the same head of treason, shall be given in evidence, unless it be expressly laid in the indictment; (d) but still, if it conduce to the proof of any of the overt acts which are laid, it may be admitted as evidence of such overt acts. (e) So, though it is not allowable in general, to inquire into any other stealing of goods, besides that specified in the indictment, yet, for the purpose of ascertaining the identity of the person, it is often important to shew, that other goods, which had been upon an adjoining part of the premises, were stolen in the same night, and afterwards found in the prisoner's possession. This is strong evidence of the prisoner having been near the prosecutor's house on the night of the robbery; and in that point of view it is material. (f) Thus also, on an indictment for the crime of arson, it may be shewn, that property, which had been taken out of the house at the time of the firing, was afterwards found secreted in the possession of the prisoner. (g)

Acts of prisoner charged in indictment alone can be proved.

When larceny of goods not laid in indictment may be proved.

Where several are proved to have been engaged in the same design, the acts and declarations of one in furtherance of that design may be received in evidence against another, though not present: (h) and it seems to make no difference as to the admissibility of the act or declaration of a conspirator against a defendant, whether the former

Acts of other persons engaged in the same design may be proved, whether they are indicted or not.

(b) *Rex v. Colc*, Mich. T. 1810, by all the Judges, MS. 1 Phil. Ev. 170. In an action against the acceptor of a bill of exchange, where the defence was, that the acceptance was forged, evidence that the party who negotiated the bill had been guilty of other forgeries, was held inadmissible. *Viney v. Barss*, 1 Esp. 292. See also *Balcetti v. Serani*, Peake N. P. C. 141. *Graft v. Bertie*, Peake's Ev. 104.

(c) *Rex v. Vandercomb and Abbott*, 2 Leach 708. *Ante*, 42.

(d) *Fost*, 245.

(e) *Fost*, 245.

(f) 1 Phil. Ev. 159.

(g) *Rickman's case*, 2 East. P. C. c. 21. s. 11. p. 1035.

(h) *Rex v. Stone*, 6 T. R. 528. See also for examples of this rule, *Rex v. Standley and others*, Russ. & Ry. 305. *Rex v. Gogerley and others*, *Ibid*, 343. *Rex v. Bingley and others*, *Ibid*. 446.

be indicted or not, or tried or not, with the latter; for the making one a co-defendant does not make his acts or declarations evidence against another, any more than they were before; the principle upon which they are admissible at all is, that the act or declaration of one is that of both united in one common design, a principle which is wholly unaffected by the consideration of their being jointly indicted.⁽ⁱ⁾ Neither does it appear to be material what the nature of the indictment is, provided the offence involve a conspiracy. Thus, upon an indictment for murder, if it appeared that others, together with the prisoner, conspired to perpetrate the crime, the act of one done in pursuance of that intention, would be evidence against the rest.^(j)

Prosecutor
confined to
proof of one
felony.

Where several different felonies are alleged in the same indictment, or the evidence appears to refer to more than one distinct unconnected felony, it is usual for the Judge, in his discretion, to call upon the counsel for the prosecution to select one felony, and to confine the evidence to that particular charge.^(k) Thus, on an indictment against a receiver for receiving several articles, if it appear that they were received at different times, the prosecutor may be put to his election:^(l) though on an indictment for stealing several articles, it is no ground for confining the prosecutor's proof to some one of the articles, that they might have been, and probably were stolen at different times, if they might have been stolen all at once.^(m)

Proving one
felony by
shewing pri-
soner guilty of
another fe-
lony.

Where the fe-
lonies are con-
nected.

Rex v. Ellis.

Generally speaking, it is not competent to a prosecutor to prove a man guilty of one felony by proving him guilty of another unconnected felony; but where several felonies are connected together, and form part of one entire transaction, then the one is evidence to shew the character of the other.⁽ⁿ⁾ In the case of *Rex v. Ellis*, which was an indictment for feloniously stealing six shillings, the following facts were proved:—The prisoner was a shopman in the employ of the prosecutrix, and his honesty being suspected, on a particular day the son of the prosecutrix put seven shillings, one half-crown, and one sixpence, marked in a particular manner, into a till in the shop, in which there was no other silver at that time, and the prisoner was watched by the prosecutrix's son, who from time to time went in and out of the shop, occasionally looking into and examining the till, while customers came into the shop and purchased goods. Upon the first examination of the till it contained 11s. 6d.; after that, the son of the prosecutrix received one shilling from a customer and put it into the till; afterwards another person paid one shilling to the prisoner, who was observed to go with it to the till—to put his hand in, and withdraw it clenched. He then left the counter, and was seen to raise his hand clenched to his waistcoat pocket. The till was examined by the witness, and 11s. 6d. were found in it instead of 13s. 6d., which ought to have been there. The prosecu-

(i) 2 Stark. Ev. 411. *Ante*, p. 572.

(j) *Ibid.*

(k) *Young v. The King*, 3 T. R. 106. by Buller, J. *Rex v. Jones*, 3 Campb. 132. *Rex v. Kingston*, 8 East. 41. But this rule does not in general

extend to misdemeanors.

(l) *Rex v. Dunn and Smith, Ry. & Mood. C. C. R. 148.*

(m) *Ibid.*

(n) *Rex v. Ellis*, 6 B. & C. 145.

tor was proceeding to prove other acts of the prisoner, in going to the till and taking money, when Wilde, Serjt., objected, that evidence of one felony had already been given, and that the prosecutrix ought not to be allowed to prove several felonies. The learned Judge over-ruled the objection, and the son of the prosecutrix proved that, upon each of several inspections of the till after the prisoner had opened it, he found a smaller sum than ought to have been there. The prisoner having been found guilty, application was made to the Court of K. B. (l) for a rule for staying the judgment, on the ground that the prosecutor ought to have been confined in proof to one felony: but the Court was of opinion that it was in the discretion of the Judge to confine the prosecutor to the proof of one felony, or to allow him to give evidence of other acts, which were all part of one entire transaction. And Mr. Justice Holroyd mentioned the case of *Rex v. Egerton*, tried before him, (m) where, upon an indictment for robbing the prosecutor of a coat, the robbery having been committed by the prisoner's threatening to charge the prosecutor with an unnatural crime, he received evidence of a second ineffectual attempt to obtain a 1*l.* note from the prosecutor by similar threats, but reserved the point for the consideration of the Judges, and they were of opinion, that the evidence was admissible, to shew that the prisoner was guilty of the former transaction.

Egerton's case.

In the case of *Rex v. Wylie*, (n) Lord Ellenborough said, he remembered a case where a man committed three burglaries in one night; he took a shirt at one place, and left it at another; and they were all so connected, that the Court went through the history of the three different burglaries.

Case cited in Rex v. Wylie.

Where it becomes necessary to prove a guilty knowledge on the part of the prisoner, evidence of other offences committed by him, though not charged in the indictment, is admissible for that purpose. Thus, upon an indictment for uttering a forged bank note, knowing it to be forged, evidence may be given of other forged notes having been uttered by the prisoner, in order to shew his knowledge of the forgery. (o) So on a prosecution for uttering counterfeit money, it is the practice, for the purpose of shewing a guilty knowledge, to receive proof of more than one uttering committed by the party about the same time, though only one uttering be charged in the indictment. (p) So, though on an indictment against a receiver for receiving several stolen articles, if it be proved that they were received at several times, the prosecutor

Evidence of other acts of prisoner as proof of his guilty knowledge.

(l) The indictment had been removed into that Court by *certiorari* from the city Court of Exeter.

(m) S. C. Russ. & Ry. 375.

(n) 1 New Rep. 94. S. C. 2 Leach 983. *Ante*, p. 384.

(o) See *ante*, p. 383, 384., and the cases there cited, viz. *Wylie's case*, 1 New Rep. 92. S. C. 2 Leach 983. *Rex v. Ball*, Russ. & Ry. 139. 1 Campb. 324. So the possession of other forged instruments may be proved as evidence of a guilty knowledge. *Ante*, p. 384. *Rex v. Hough*,

Russ. & Ry. 120.; but there must be regular proof that they are forged. *Ante*, p. 385. *Rex v. Millard*, Russ. & Ry. 385. It is questionable, whether it may be proved that the prisoner had uttered forged bills or notes of a different kind. Bayley on Bills, 4th Ed. 450. Where the second uttering was made the subject of a distinct indictment, *Vaughan, B.*, held, that it could not be given in evidence to shew a guilty knowledge. *Rex v. Smith*, 2 Carr & P. 639.

(p) *Ante*, Vol. I. p. 85.

Proof of other acts of prisoner as evidence of his guilty intent.

may be put to his election, yet evidence may be given of all the receipts for the purpose of proving guilty knowledge. (p) If it be material to shew the intent with which the act charged was done, evidence may be given of a distinct offence not laid in the indictment. Thus, upon an indictment for maliciously shooting, if it be questionable whether the shooting was by accident or design, proof may be given that the prisoner at another time intentionally shot at the same person. (q) On a prosecution for a libel, the publication of other libels, by the defendant, not laid in the indictment, may be given in evidence, to shew *quo animo* the defendant published that in question. (r) In the trial of an indictment for murder, former grudges and antecedent menaces are admitted to be given in evidence as proof of the prisoner's malice against the deceased. (s) And it has been considered, in a case where three persons were charged with uttering a forged note, that other acts done by all of them jointly, or any of them separately, shortly before the offence, may be given in evidence to shew the confederacy and common purpose, although such acts constitute distinct felonies. (t) On an indictment for sending a threatening letter, prior and subsequent letters, from the prisoner to the party threatened, may be given in evidence, as explanatory of the meaning and intent of the particular letter on which the indictment is framed. (u)

Proof of other acts and declarations of prisoner as evidence for him of his innocence.

As other acts and declarations of the prisoner, besides those charged in the indictment, may be given in evidence on the part of the prosecution, so he himself in his defence may in some cases prove other acts and declarations of his own, as evidence of his innocence. Thus, on a charge of murder, expressions of good will, and acts of kindness, on the part of the prisoner towards the deceased, are always considered important evidence, as shewing what was his general disposition towards the deceased, from which the jury may be led to conclude, that his intention could not have been what the charge imputes. (v) So in the case of *Rex v. Lambert and Perry*, (w) where the supposed libel, which was the subject of prosecution, was contained in a paragraph of a newspaper, of which the defendants were the printer and proprietor, it was held by Lord Ellenborough, that the defendants had a right to have read in evidence, any other paragraph in the same newspaper, connected with the subject of the passage charged as libellous, (although disjoined from it by extraneous matter, and printed in a different character,) for the purpose of shewing the intention and mind of the defendants with respect to the specific paragraph laid in the indictment. And as, in trials for conspira-

(p) *Rex v. Dunn and another*, Ry. Mood. C. C. R. 148.

(q) *Rex v. Yoke*, Russ. & Ry. 531.

(r) *Ante*, p. 242. *Stuart v. Lovell*, 2 Stark. N. P. C. 95.

(s) 1 Phil. Ev. 169. So the declarations of the prisoner, and the seditious language used by him, are clearly admissible in evidence on an indictment for high treason, explain-

ing his conduct, and shewing the nature and object of the conspiracy. *Ibid.* 167. *Rex v. Watson*, 2 Stark. N. P. C. 134.

(t) *Rex v. Tattersall*, MS. Bayley, J. *Ante*, Vol. I. p. 22.

(u) *Robinson's case*, 2 Leach 749. 2 East. P. C. c. 23. s. 2. p. 1110. *Ante*, p. 587.

(v) 1 Phil. Ev. 166.

(w) 2 Campb. 400.

cies, whatever the prisoner may have done or said, at any meeting alleged to be held in pursuance of conspiracy, is admissible in evidence against him, on the part of the prosecution; so, on the other hand, any other part of his conduct at the same meetings, will be allowed to be proved, on his behalf; for the intention and design of the party, at a particular time, are best explained by a complete view of every part of his conduct at that time, and not merely from the proof of a single and insulated act or declaration.(x) In the case of Walker and others, who were tried for a conspiracy to overthrow the government, and evidence was produced, on the part of the prosecution, to shew that the conspiracy existed, and was brought into overt act at meetings in the presence of Walker, the counsel for the prisoners was allowed to ask a witness, whether, at any of these times, he had ever heard Walker utter any word inconsistent with the duty of a good subject? The question was opposed, but held by Mr. Justice Heath to be admissible. The prisoner's counsel were also allowed in the same case, to inquire into the general declarations of the prisoner at these meetings, whether the witness had heard him say any thing that had a tendency to disturb the peace of the kingdom; and questions to the same effect were put to many other witnesses in succession.(y)

On the trial of Hardy for high treason, where the overt act charged was, that the prisoner, for the purpose of accomplishing the treason of compassing the King's death, did conspire with others, to call a convention of the people, in order that the convention might depose the King; the counsel for the prisoner were allowed to ask a witness whether, before the time of the convention, which was imputed to the prisoner, he had ever heard from him what his objects were, and whether he had at all mixed himself in that business.(z) But the better opinion seems to be, that in order to make such other acts or declarations of the prisoner applicable to his defence, it must be shewn that they are in some way connected with the facts proved against him.(a) In the case of Horne Tooke and others, however, for high treason, several publications having been given in evidence on the part of the crown, containing republican doctrines and opinions, the distribution of which had been promoted by the prisoners, during the period assigned in the indictment for the existence of the conspiracy, the prisoner was allowed to read in his defence, various extracts from works which he had published at a former period of his life; and these the jury were permitted to carry along with them when they retired to consider of their verdict.(b) But the propriety of allowing such a defence has been questioned by very high authority.(c)

But such acts and declarations of the prisoner must be connected with the facts proved against him.

(x) 1 Phil. Ev. 170.

(y) *Ibid.*

(z) 24 How. St. Tr. 1097. On an indictment for a conspiracy, the letters of one of two defendants to the other, are, under certain circumstances, admissible in evidence in his favour, to shew that he was the dupe of the other, and not himself a participator in the fraud, *Rex v. Whitehead*, 1

Carr & P. 67.

(a) *Rex v. Lambert and Perry*, 2 Campb. 400. Lord George Gordon's case, 21 How. St. Tr. 542. Hanson's case, 31 How. St. Tr. 4281. 1 Phil. Ev., 71.

(b) 1 East. P. C. c. 11. s. 8. p. 61. 25 How. St. Tr. 545.

(c) By Lord Ellenborough in *Rex v. Lambert and Perry*, 2 Campb. 400.

Evidence of several transactions when cumulative instances are necessary to prove the offence charged.

It may also happen, that from the nature of the offence charged, it is impossible to confine the evidence to proof of a single transaction. Thus, on an indictment against several defendants for a conspiracy to cause themselves to be believed persons of large property, for the purpose of defrauding tradesmen, Lord Ellenborough allowed the prosecutor to prove various instances of their giving false representations of their circumstances; (d) observing that the indictment was for a conspiracy to carry on the business of common cheats, and cumulative instances were necessary to prove the offence. The same sort of evidence, said his Lordship, is allowed on an indictment for barratry; (e) and in a prosecution for high treason itself, the gravest of all offences.

Cases as to the relevancy of evidence.

The rule is clear and general, that no question can be put which is not relevant to the issue (unless for the purpose of impeaching the credit of a witness;) but the applicability of the rule must obviously depend upon the particular circumstances of each individual case, and will not admit of a general demonstration. It may, however, be useful to state some criminal cases, where questions as to the relevancy of evidence have arisen and been decided. On the trial of an indictment against several persons for a conspiracy, in unlawfully assembling for the purpose of exciting discontent and disaffection, it would be irrelevant to inquire, on behalf of the defendants, what the conduct of those, employed to disperse the meeting, may have been at the time of the dispersion, if no evidence has been previously offered, on the part of the prosecution, as to the conduct of the meeting at that time or subsequently; for the conduct of the dispersers of the meeting can have no bearing on the intention and object of the meeting itself; in other words, it is irrelevant to the matters in issue. (f) In such a prosecution, as the material points for the consideration of the jury are, the general character and intention of the assembly, and the particular case of each defendant as connected with that general character, it would be relevant to prove, on the part of the prosecution, that bodies of men came from different parts of the country to attend the meeting, arranged and organized in the same manner, and acting in concert. It would be relevant also to shew, that early on the day of the meeting, in a spot at some distance from the place of meeting, (from which very spot a body of men came afterwards to the place of meeting,) a great number of persons, so organized, had assembled, and had there conducted themselves in a disloyal, riotous, or seditious manner. (g) Further, it would be relevant, on such a trial, to produce in evidence certain resolutions, which had been proposed, by one of the defendants, at a large assembly in another part of the country, very recently held for the same professed object and purpose, as were avowed by the meeting in question, that defendant having acted at

Unlawful assembly.
Hunt's case.

(d) *Rex v. Roberts*, 1 Campb. 400. *Ante*, p. 373.

(e) The prosecutor must, before the trial, give the defendant a note of the particular acts of barratry he intends to prove against him; and will not be at liberty to give evidence of

any other. *Ante*, Vol. I. p. 186.

(f) *Rex v. Hunt*, 3 B. & A. 566, 577. 1 Phil. Ev. 169. See also *Redford v. Burley*, 3 Stark. N. P. C. 87, 88, 91.

(g) *Ibid.*

both meetings as president or chairman; in a question of intention, as this is, it is most clearly relevant to shew, against that individual, that, at a similar meeting, held for an object professedly similar, such matters had passed under his immediate auspices.^(h)

In cases of treason and felony, it may be proved that articles were found secreted in the prisoner's house, after his apprehension. In Watson's case, evidence was admitted that a quantity of pikes had been found secreted in the prisoner's house subsequently to his apprehension.⁽ⁱ⁾ With respect to writings found after the prisoner's apprehension, it appears to have been laid down in Hardy's case,^(j) that papers found in the possession of conspirators with the prisoner, but subsequently to his apprehension, ought not to be read against him, unless there was evidence to shew their previous existence; for otherwise there was no evidence that the prisoner was a party to it. And on a prosecution against Hevey, Beatty, and M'Carty, for a conspiracy, it was held that some letters which were directed to the prisoners, and intercepted at the post-office after their apprehension, were not admissible in evidence against them, as they had never been in the custody of the prisoners, or in any way adopted by them.^(k) So on an indictment for uttering a forged bank-note, knowing it to be forged, it was held that a letter purporting to come from the prisoner's brother, and left by the postman pursuant to its direction, at the prisoner's lodgings, after he was apprehended, and during his confinement, but never actually in his custody, could not be read in evidence as proof of his knowledge that the note was forged.^(l) But in Watson's case,^(m) it was held that papers found in the lodgings of a conspirator at a period subsequent to the apprehension of the prisoner, might be read in evidence, although no absolute proof was given of their previous existence, where strong presumption existed that the lodgings had not been entered by any one in the interval between the apprehension and the finding, and where the papers were intimately connected with the objects of the conspiracy as detailed in evidence.⁽ⁿ⁾ Writ-

Articles found in prisoner's house after his apprehension.

Writings found after prisoner's apprehension.

Writings found in pri-

(h) *Rex v. Hunt*, 3 B. & A. 566, 577. 1 Phil. Ev. 169. See also *Redford v. Burley*, 3 Stark. N. P. C. 87, 88, 91.

(i) 2 Stark. N. P. C. 137. Lord Ellenborough, in giving his opinion on this point, cited a case from recollection, where a butler to a banker at Malton, had been taken up upon suspicion of having committed a great robbery; the prisoner had been seen near the privy, and this circumstance having excited suspicion in the minds of the counsel, who considered the case during the assizes at York; at their instance, search was made, and in the privy all the plate was found. The plate was produced, and the prisoner was in consequence convicted; he had been separated from the custody of the plate, since he had been

confined in York Castle, for some time: but no doubt was entertained as to the admissibility of the evidence. Abbott, C. J., also observed, that an assize had scarcely ever occurred, where it did not happen that part of the evidence against a prisoner consisted of proof that the stolen property was found in his house after his apprehension.

(j) 24 How. St. Tr. 452.

(k) *Hevey, Beatty, and M'Carty's case*, 1 Leach 235.

(l) *Huet's case*, 2 Leach 820.

(m) 2 Stark. N. P. C. 140.

(n) A letter found upon the prisoner may be read, but it is no evidence of the facts it states. Thus, on an indictment against a person employed in the post-office for secreting a letter containing a bill of exchange, the

soner's possession though not published, may be read if relevant to the charge in the indictment.

ings found in the prisoner's possession, but not published, if plainly connected with the treasonable design charged, are evidence of such design upon an indictment for treason, though not published.(o) But it seems, that if it be doubtful whether they are so connected, they are not admissible.(p) In Watson's case, one of the objections made to the admission of a paper found in the house of a co-conspirator was, that there was no proof that it had been published; and Sidney's case was cited: but the Court distinguished that case from the present, and Abbott, J., said, that he had always understood the ground of objection in Sidney's case was, not that the papers had never been published, but that they had no relation to the treasonable practices charged in the indictment, and he referred to Mr. East's Pleas of the Crown, 119, where it is said, "writings plainly applicable to some treasonable design in contemplation, are clear and satisfactory evidence of such design, although not published. If, say Mr. Justice Foster, and Mr. Justice Blackstone, the 'papers found in Sidney's closet' had been plainly relative to the other treasonable practices charged in the indictment, they might have been read in evidence against him." That was the objection which had constantly been made to the reception of the evidence in Sidney's case. The paper there was not only an unpublished paper, but appeared to have been composed several years before the crime charged to have been committed."(q)

Without proof of being in prisoner's handwriting.

On an indictment against a county for not repairing a bridge, evidence may be given that individuals have repaired it.

If the papers found in the prisoner's custody be plainly relative to the design charged, they may be read in evidence without any proof of the handwriting being that of the prisoner.(r)

On an indictment against a county for not repairing a public bridge, the defendants may shew under the general issue that the bridge had been repaired from time to time by private individuals: for one question is, whether the bridge is a public bridge; and upon that question it is material to inquire, by whom and in what manner it had been repaired, with a view of ascertaining whether those repairs were adapted to the service of the public, or merely to the purposes of ornament or private convenience.(s) It is one medium of proof to shew that the bridge has been repaired by individuals, though that alone would be of very little weight.(t)

Whether prisoner may in his defence give evidence of a conspiracy to suborn witnesses against him.

In a question put by the House of Lords to the Judges, in the course of the proceedings in the Queen's case, it was assumed, that proof of the existence of a conspiracy between the prosecutor and others to suborn witnesses against the accused, is a legitimate ground of defence. Lord Chief Justice Abbott, in delivering their opinion, observed, that the Judges understood that such an assumption had been made in the question put to them, and that the House did not ask their opinion on that point;(u)

contents of the letter, which was found upon him, were held inadmissible to prove, that the bill was enclosed in it. *Rex v. Plumer, Russ. & Ry.* 264.

(o) *Rex v. Watson*, 2 Stark. N. P. C. 141.

(p) *Ibid.*

(q) 2 Stark. N. P. C. 147.

(r) 1 East. P. C. C. 11. s. 55. p. 119.

(s) *Rex v. (Inhab.) Northamptonshire*, 2 M. & S. 262.

(t) 1 Phil. Ev. 159.

(u) The Queen's case, 2 Brod. & Bing. 310, 311.

from which it may perhaps be inferred, that their Lordships had doubts whether such a defence is allowable.

In civil suits, as the evidence is to be confined to the points in issue, the character of either party cannot be inquired into, unless it is put in issue by the nature of the suit itself.(v) In criminal proceedings, the prosecutor being usually also a witness, his character may be attacked in the prisoner's defence, in the way already pointed out, as applicable to the impeachment of the credit of witnesses generally. In the particular instance of an indictment for a rape, or for an assault with an intent to commit a rape, evidence is admissible on the part of the prisoner, not merely, as in the case of an ordinary witness, that from her general bad character the prosecutrix ought not to be believed on her oath, but her character as to general chastity may be impeached by general evidence.(w) Evidence, however, of particular facts to impeach her chastity is inadmissible,(x) and her cross-examination for the purpose of impeaching her character for chastity, must be conducted according to the rules already pointed out,(y) to which other cross-examinations, tending to shake the credit of a witness, are subject.

Evidence of character.

Character of prosecutor.

In all criminal prosecutions the prisoner is always permitted to call witnesses to speak to his general character,(z) who are usually examined in his behalf, as to how long they have known him, and what his general character for honesty, humanity, or peaceable conduct, (according to the nature of the offence charged) has been during that time. The enquiry ought manifestly to bear some analogy and reference to the nature of the charge against the prisoner. On a charge of stealing it would be irrelevant and absurd to enquire into his loyalty or humanity: on a charge of high treason, it would be equally absurd to inquire into his honesty and punctuality in private dealings.(a) The enquiry must also be made with reference to the general character of the prisoner; for it is general character alone which can afford any test of general conduct, or raise a presumption that the person, who had maintained a fair reputation down to a certain period, would not then begin to act an unworthy part: and, therefore, proof of particular transactions, in which the prisoner may have been concerned, are not admissible.(b)

Evidence of prisoner's good character;

must be applicable to the charge;

must not refer to particular acts.

It has been usual to treat the good character of the party accused as evidence to be taken into consideration only in doubtful cases. Juries have generally been told that where the facts proved

Method of leaving evidence of prisoner's cha-

(v) 1 Phil. Ev. 164.

(w) *Ante*, Vol. I. p. 563.

(x) *Rex v. Hodgson*, Russ. & Ry. C. C. R. 211. *Ante*, Vol. I. 563.

(y) *Ante*, p. 625, et seq.

(z) Formerly evidence of the prisoner's good character was admitted in capital cases only, in *favorem vite*. *Rex v. Harris*, 2 St. Tr. 1039. This evidence is now admitted in all prosecutions which subject a man to corporal punishment; but not in actions for informations for penalties, though

founded on the fraudulent conduct of the parties. *Peake's Ev.* 7. The true line of distinction, C. B. Eyre observed, is this: in a direct prosecution for a crime such evidence is admissible; but where the prosecution is not directly for the crime but for the penalty, it is not. *Attorney-General v. Bowman*, cited 2 Bos. & Pul. 582.

(a) 1 Phil. Ev. 166.

(b) *Ibid*.

character to the jury.

are such as to satisfy their minds of the guilt of the party, character however excellent is no subject for their consideration; but that when they entertain any doubt as to the guilt of the party, they may properly turn their attention to the good character which he has received. It is, however, submitted with deference that the good character of the party accused, satisfactorily established by competent witnesses, is an ingredient which ought always to be submitted to the consideration of the jury, together with the other facts and circumstances of the case. The nature of the charge, and the evidence by which it is supported, will often render such ingredient of little or no avail; but the more correct course seems to be, not, in any case, to withdraw it from consideration, but to leave the jury to form their conclusion, upon the whole of the evidence, whether an individual whose character was previously unblemished, has or has not committed the particular crime for which he is called upon to answer.

Prosecutor cannot shew the prisoner's bad character.

The prosecutor cannot enter into the defendant's character, unless the defendant enable him to do so, by calling witnesses in support of it; and even then the prosecutor cannot examine to particular facts, the general character of the defendant not being put into issue, but coming in collaterally.(c)

Previous conviction for felony must be proved upon an indictment, for a subsequent one, under stat. 7 & 8 Geo. 4. c. 28.

Upon an indictment under stat. 7 & 8 Geo. 4. c. 28. s. 11. for a felony not punishable with death, after a previous conviction of felony, the prosecutor must prove the first conviction in the course of the case for the crown, by the method pointed out in the statute.

SECTION III.

What Allegations must be proved, and what may be rejected.

In the present section it is proposed to consider, 1st. What allegations in an indictment must be proved to support it, and what may be disregarded in evidence; and, therewith, of the subjects of Surplusage, and the divisibility of averments. 2dly. With what precision those allegations, which cannot be disregarded in evidence, must be proved; and, therewith, of the subject of Variance.

1st. What allegations must be proved.

1st. What allegations must be proved, and what may be disregarded in evidence. In order to convict a man of an offence, all the material facts which constitute the offence, and which are necessary to enable the parties to avail themselves of the verdict and judgment, should the same charge be again brought forward, must be stated upon the indictment; and all these requisite alle-

(c) Bull. N. P. 296. citing *Hurd v. Martin*, Cowp. 331.

gations must be satisfied in evidence, and proved as laid. But allegations not essential to such a purpose, which might be entirely omitted, without affecting the charge against the prisoner, and without detriment to the indictment, are considered as mere surplusage, and may be disregarded in evidence.^(z) Thus, where the prisoner was charged with robbery *near the highway*, in a case that occurred soon after the stat. 3 W. & M. c. 9. (which takes away clergy from all robberies, whether near the highway or elsewhere), and a robbery in a house was the offence proved, all the Judges were of opinion that the prisoner was ousted of the benefit of clergy.^(a) So upon an indictment which charged the prisoner with robbing a person in a field, near the highway, where the jury found a verdict, "guilty of the robbery, but not near the highway," it was holden by all the Judges, that the prisoners were ousted.^(b) So where John Pye was convicted upon an indictment, which charged him with robbing Robert Fernyhough *in the dwelling-house* of Aaron Wilday, and it was proved that the robbery was committed in a house, but it did not appear who was the owner of it: on reference to the Judges, they all held the conviction proper.^(c) In Susannah Minton's case, the indictment charged, that she feloniously, &c. *in the night time* set fire to the barn of P. G., and burned the same. The jury found the prisoner guilty of setting fire to and burning the barn, but not in the night time. And the Judges held that she was properly convicted.^(d) Upon an indictment on the statute 8 & 9 W. 3. c. 26. s. 1., for having a die *made of iron and steel* in possession, without lawful authority, the Judges, on a case reserved for their opinion, held, that as it was immaterial to the offence of what the die was made, proof of a die, either of iron or steel, or both, would satisfy this charge.^(e) So in the case of Hickman and Dyer, where the indictment was upon the repealed statute 4 Geo. 2. c. 32. "for stealing so much lead belonging to the Rev. G. C. W., and then and there fixed to a certain building called Hendon Church:" Buller, J., thought the charging the lead to be the property of any one was absurd and repugnant, property (in this respect) being only applicable to personal things; that it should only have been charged to be lead affixed to the church; and that, therefore, the allegation as to property ought to be rejected as surplusage.^(f)

Surplusage.
Examples of
surplusage.

In the case of *Rex v. Holt*, which was an ex-officio information for a libel, the information stated, that before the publishing

(z) *Rex v. Holt*, 2 Leach 593. 1 Phil. Ev. 196.

(a) *Ante*, p. 90. Summer's case, 2 East. P. C. c. 16. s. 168. p. 785.

(b) *Ante*, p. 90. Wardle's case, Russ. & Ry. C. C. R. 9. S. C. 2 East. P. C. c. 16. s. 168. p. 785.

(c) Pye's case, 2 East. P. C. c. 16. s. 168. p. 785, 786. *Ante*, p. 91. S. P. by all the Judges in Johnstone's case, *ibid.*

(d) Minton's case, 2 East. P. C. c. 21. s. 5. p. 1021.

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(e) *Rex v. Oxford*, Russ. & Ry. C. C. R. 382. *Rex v. Phillips*, *ibid.* 369.

(f) 2 East. P. C. c. 16. s. 31. p. 593. On the authority of this case, Holroyd, J., doubted whether, on an indictment on the repealed stat. 3 W. & M. c. 9. s. 5. against John Healey, for stealing in a lodging let to him, the allegation of the person *by whom* the lodging was let, might not be rejected as surplusage. *Rex v. Healey*, Ry. & Mood. C. C. R. 1.

of the libel, the King had issued a proclamation; that after the said proclamation had been issued, *divers addresses* on the occasion of such proclamation had been presented to his Majesty by divers of his subjects: it then proceeded to state, that the defendant well knowing the premises, &c., but intending to bring *the said proclamation* into contempt, &c., and to stir up sedition, &c. published the libel in question, entitled "A letter addressed to the Addressers on the late proclamation," which was averred to mean his said Majesty's proclamation, after which followed the proclamation. After conviction, it was objected, on behalf of the defendant, that there was no legal evidence at the trial to prove that the addresses had been presented to the King. Buller, J., after stating his opinion that the fact had been sufficiently proved, observed, "However, on this information, I do not think the prosecutor need have given any evidence at all of these addresses; the averment respecting these addresses seems unnecessary; for the information, after stating the proclamation and the addresses, charges the defendant with a seditious intent to bring the said proclamation into contempt, without noticing the addresses again. The distinction between material and immaterial averments is perfectly well settled; if the averment be material, that is, if it be connected with the charge, it must be proved: but if it be totally immaterial, and if the libel be not connected with the averment, it need not be proved." (g)

Descriptive averments.

No allegation can be rejected which is descriptive of the identity of any thing essential to the charge.

In considering the subject of surplusage, it must always be remembered, that it is a most general rule, that no allegation, whether necessary or unnecessary, which is *descriptive* of the *identity* of that which is legally essential to the charge on the indictment, can ever be rejected. Thus, if a man were to be charged with stealing a *black* horse, the allegation of colour, although unnecessary, yet being descriptive of that which is material, could not be rejected. (h) So where the prisoner was indicted on the Black Act for maliciously shooting at H. Sandon in the dwelling-house of *James Brewer* and *John Sandy*; and it appeared upon the evidence, that it was in the dwelling-house of *John Brewer* and *James Sandy*; the Court held the variance fatal, and said that the prosecutor had thought proper to state the names of the owner of the house where the fact was charged to have been committed; and that although perhaps that averment was not necessary, (the statute saying, "who shall maliciously shoot at any person in any dwelling-house or other place), yet, having averred that it was the house of *John Brewer* and *James Sandy*, he was bound to prove it as laid. (i) So upon an indictment under stat.

(g) *Rex v. Holt*, 5 T. R. 446. S. C. 2 Leach 593. See also *Rex v. Phillips*, 3 Campb. 74. *Ante*, Vol. I. 553.

(h) 3 Stark. Ev. 1531. So upon an indictment for stealing four *live* tame turkeys, the Judges held that the word "live" being a description of the quality of the thing stolen, could not be rejected as surplusage. *Rex v. Edwards and Walker*, Russ. & Ry. C. C. R. 497. And if it could have been

so rejected, the indictment would not have been supported by proof of stealing *dead* turkeys; for upon a general statement that a party stole an animal, it is intended that he stole it alive. *Ibid.*

(i) *Duroure's case*, 1 East. P. C. 415. S. C. 1 Leach 351. *Ante*, Vol. I. 593.; but see *Pye's case*, and *Johnstone's case*, *ante*, p. 705.

57 Geo. 3. c. 90., for being found armed with intent to destroy game in a certain wood "called *the old walk* of and belonging to, and then in the occupation of, John James, Earl of Waldegrave," it was proved that the wood in question was in the occupation of the Earl of Waldegrave; but it was also proved that the wood had always been called the *long walk*, and had never been called or known by the name of the *old walk*. And upon a case reserved for the opinion of the Judges, it was held, that though it is not necessary, where the name of the owner or occupier of the close is stated, to state the name of the close also, yet that the averment could not be rejected, and the variance was fatal.(j) So where the indictment was for breaking, &c. the house of J. Davis, "with intent to steal the goods of J. Wakelin, in the said house being," and there was no such person who had goods in the house, but J. W. was put by mistake for J. D.; the prisoner was held entitled to an acquittal; and it was ruled, that the words "of J. W." could not be rejected as surplusage, for the words were sensible and material, it being material to lay truly the property in the goods; and without such words the description of the offence would be incomplete.(k) This is not like the case of laying a robbery in the dwelling-house of A., which turns out to be the dwelling-house of B., because that circumstance is perfectly immaterial in robbery.(l) Where an indictment for stealing a bank-note, described it as *signed by A. Hooper*, for the Governor and Company of the Bank of England, it was held by the Judges, on a case reserved, that there could be no conviction without evidence of the signature being by *A. Hooper*.(m)

So the name of the person in whom the property which is the subject of the charge is laid, or on whom the offence is stated to have been committed, cannot be rejected as surplusage, but must be proved, both as to christian and surname, according to the indictment; for if the names there stated, are not his real names, or the names by which he is usually known, the prisoner must be acquitted.(n) But if there be a sufficient description of the person and degree of the owner of the property, which is supported in evidence, any subsequent addition may, it seems, be rejected as surplusage. Thus, where in an indictment for larceny, before the Irish union, the goods stolen were stated to be the property of James Hamilton, Esq. *commonly called* Earl of Clanbrassil, in the kingdom of Ireland, and it appeared in evidence, that the prosecutor was an Irish peer, viz. Earl of Clanbrassil, in Ireland, the Judges, on a case reserved, were of opinion that, though the correct mode of describing the person of the prosecutor would have been "James Hamilton, Esq. Earl of Clanbrassil, in the kingdom of Ireland," yet as "James Hamilton, Esq. was a sufficient description of his person and degree, the subsequent words commonly called Earl of

(j) *Rex v. Owen and Prickett*, Ry. & Mood. C. C. R. 118.

p. 37.

(l) *Ibid.*

(k) *Jenk's case*, 2 East. P. C. c. 15. s. 25. p. 514. So also on an indictment for burglary, where the name of the owner of the dwelling-house is mis-stated, the error is fatal. *Ante*,

(m) *Rex v. Craven*, Russ. & Ry. C. C. R. 14.

(n) See *post*. p. 714. as to variances in respect of the name of the party injured.

"Clanbrassil, in the kingdom of Ireland," might be rejected as surplusage.^(o)

Conviction
pro tanto.

It is sufficient
to prove so
much of the
indictment as
constitutes a
crime punish-
able by law.

Although it be true, as above stated, that in order to convict a man of an offence, that offence must be completely averred in the indictment, and the evidence must correspond with and support the whole of the material averments, yet it by no means follows, that it is necessary to prove the offence charged in the indictment *to the whole extent laid*: for it is fully settled, that in criminal cases, it is sufficient for the prosecutor to prove so much of the charge as constitutes an offence punishable by law.^(p) "The distinction, said Lord Ellenborough, in the case of *Rex v. Hunt*,^(q) runs through the whole criminal law, and it is invariably enough to prove so much of the indictment as shews "that the defendant has committed a substantive crime therein specified."^(r) On a charge of petit treason, if the killing with malice is proved, but no circumstances of aggravation are proved to make the offence treasonable, the prisoner may be found guilty of the murder.^(s) If A. be charged with the murder of B., *i. e.*

(o) *Rex v. Mary Graham*, 2 Leach 547. From what is said in the latter part of the opinion of the Judges, as delivered by Baron Perryn, it is not clear whether their Lordships thought the words stated above should be rejected as surplusage, or only the words "commonly called." In a case before Mr. Justice Burrough, where the prisoner was indicted for stealing goods, laid to be the property of Andrew Wm. Gother, Esq. and it appeared on the cross-examination of the prosecutor, that he was not an esquire, whereupon it was objected that it was a fatal variance; the learned Judge over-ruled the objection, and held that the addition of esquire to the name of the person in whom the property was laid, was mere surplusage, *Rex v. Ogilvie*, 2 Carr & P. 230. It has been said, however, that where the person injured has a name of dignity, as a peer, baronet, or knight, he should be described by it; and that if he be described as a knight, when in fact he is a baronet, or the contrary, the variance would be fatal; because a name of dignity is not merely an addition, but is actually part of the name, Archb. Cr. P. 11.

(p) 4 B. & C. 330. *Rex v. Holingberry*. This rule, however, must be understood, as it should seem, with this qualification; that if a prisoner be indicted for murder or felony, he cannot be convicted of a misdemeanor. Thus, where upon the facts stated upon a special verdict, upon an indictment for felony, the Court of King's Bench was of opi-

nion, that the prisoner could not be convicted of felony, the Chief Justice (Sir Wm. Lee.) started a question, whether, as the case amounted undoubtedly to a great misdemeanor, they could not give judgment as for a trespass: and the counsel for the crown, in support of the power of the Court to do so, cited 2 Hawk. 440., and Cro. Jac. 497. Martin Leaser's case, 1 And. 351. Kel. 29. Dalt. 331. *E contra*, it was insisted that by this means a defendant would be deprived of many advantages; for if he was indicted properly, he might have counsel, a copy of his indictment, and a special jury. The Court ordered the prisoner to be discharged; and said, that in the cases cited *pro rege*, the Judges appear to have been transported with zeal too far. *Rex v. Westbeer*, 2 Stra. 1133. S. C. 1 Leach 12.

(q) 2 Campb. 585.

(r) The same distinction applies to the averments in the indictment. If an offence sufficient to maintain the indictment be well laid, it is enough, though other matters which would increase the offence are ill averred. In a civil action, where one part of the declaration is ill, and the jury find entire damages, the judgment must be arrested; because the Court cannot apportion them: but in indictments the Court assesses the fine, and they will set it only according to those facts which are well laid. *Reg. v. Ingram*, 1 Salk. 384.

(s) Case of Swan and Jefferys, Fost. 104. 1 Phil. Ev. 193.

with feloniously killing B. of malice prepense, and all but the fact of malice prepense be proved, A. may clearly be convicted of manslaughter; for the indictment contains all the allegations essential to that charge; A. is fully apprized of the nature of it, the verdict enables the Court to pronounce the proper judgment, and A. may plead his acquittal or conviction in bar of any subsequent indictment founded on the same facts.(t)

On an indictment for burglary and stealing goods, if it appear that no burglary was committed, as where the breaking and entering were not in the night, or on a charge of robbery, where the property was not taken from the person by violence, or by putting in fear, the prisoner may be found guilty of the simple larceny only.(u)

On an indictment for stealing in a dwelling-house, persons being therein and put in fear, the prisoner may be convicted of simple larceny.(x) And in all complicated larcenies, the prisoner may be acquitted of the circumstances of aggravation, as the fear or violence, and found guilty of the simple larceny.(y) So upon an indictment for horsetealing, there may be a conviction for simple larceny.(z) So if a man be indicted upon the statute of 1 Jac. of stabbing *contra formam statuti*, the jury may acquit him upon the statute, and find him guilty of manslaughter at common law.(a) And if a man be indicted of stealing of goods of the value of ten shillings, the jury may find him guilty only of goods to the value of sixpence, and so guilty only of petty larceny.(b) If an indictment for treason charge several overt acts, it is sufficient to prove one.(c) If the indictment charges, that the defendant did, and caused to be done, a particular act, as "forged, and caused to be forged," it is enough to prove either one or the other.(d) If the defendant is charged with composing, printing, and publishing, a libel, he may be convicted only of

Instances of
divisible aver-
ments.

(t) 4 Stark. Ev. 1529. Mackalley's case, 9 Rep. 67 b. Co. Litt. 282 a. Gilb. Ev. 233.

(u) 2 Hale P. C. 302. 1 Phil. Ev. 193. So where the prisoners were acquitted of the burglary, upon an indictment for a burglary and larceny, and found guilty of stealing in the dwelling-house to the amount of forty shillings, it was holden that they were excluded from their clergy, though there was no separate and distinct count in the indictment on the statute 12 Ann. c. 7. now repealed by stat. 7 & 8 Geo. 4. c. 27. and the Judges were of opinion, that the indictment contained every charge that was necessary in an indictment upon that statute. *Ante*, p. 52. *Rex v. Withal* and another, 1 Leach 88.

(x) *Ante*, p. 50. *Rex v. Etherington*, 2 Leach 671. S. C. 2 East. P. C. 635.

(y) 2 East. P. C. 784. But where, upon an indictment for robbery from

the person, a special verdict was found, stating facts which in judgment of law did not amount to a taking from the person, but shewed a larceny of the party's goods; yet as the only doubt referred to the jury was, whether the prisoners were or were not guilty of the felony and robbery charged against them in the indictment, the Judges thought that judgment as of larceny could not be given upon that finding; but they remanded the prisoners to be tried upon another indictment for that offence. *Ibid*.

(z) *Rex v. Beaney*, Russ. & Ry. 416.

(a) 2 Hale P. C. 302.

(b) *Ibid*. The distinction between grand and petit larceny is abolished by 7 & 8 Geo. 4. c. 29.

(c) Fost. 194.

(d) By Lord Mansfield in *Rex v. Middlehurst*, 1 Burr. 400.

the printing and publishing. (e) So where the prisoner was indicted for having published a libel of and concerning certain magistrates, with intent to defame those magistrates, and also with a malicious intent to bring the administration of justice into contempt; Bayley, J., informed the jury, that if they were of opinion that the defendant had published the libel with either of those intentions, they ought to find the prisoner guilty. (f) Where the indictment charged the prisoner with having assaulted a female child, with intent to abuse and carnally to know her; and the jury found that the prisoner assaulted the child with intent to abuse her, but negatived the intention charged carnally to know her; Holroyd, J., held that the averment of intention was divisible, and that the prisoner might be convicted of an assault with intent to abuse simply. (g) On an indictment on the 7 Geo. 3. c. 50. s. 1. stating the prisoner to have been employed in two branches of the post-office, proof of his having been employed in either, was held sufficient. (h) And in the same case, the letter embezzled having been described in the indictment as having contained several notes, proof of its having contained any one of them was held sufficient. (i) Upon an indictment for obtaining money under false pretences, it is not necessary to prove the whole of the pretence charged, proof of part of the pretence, and that the money was obtained by such part is sufficient. (j) So an indictment for embezzling need not specify the exact sum embezzled: as where the indictment charged the prisoner with embezzling, among other things, notes for one pound each, and evidence was given that there were one pound notes in the sum of money embezzled; this was held to support the indictment. (k) Where an information for publishing a malicious and seditious libel, contained an averment that outrages had been committed *in and in the neighbourhood* of Nottingham; it was held that such averment was divisible, and that it need not be proved that they had been committed in both places. (l) But if it be necessary to state a prescription in an indictment, such prescription must be proved to the whole extent laid; otherwise the consequence might be, that the record would be evidence of a right which had been expressly disproved at the trial. (m)

Joint offence charged against several, and one alone convicted.

Where the indictment charges several with a joint offence, any one of them alone may be found guilty. But they cannot be found guilty separately of separate parts of the charge, and if two be so found guilty separately, a pardon must be obtained, or *nolle*

(e) *Rex v. Hunt*, 2 Campb. 583.
Rex v. Williams, *Ibid.* 646.

(f) *Rex v. Evans*, 3 Stark. N. P. C. 35.

(g) *Rex v. Dawson*, 3 Stark. N. P. C. 62.

(h) *Rex v. Ellins*, Russ. & Ry. C. C. R. 188. *Ante*, p. 233. And see *Shaw's case*, *ibid.*

(i) *Ibid.*

(j) *Rex v. Hill*, Russ. & Ry. C. C. R. 190. *Ante*, p. 311.

(k) *Carson's case*, Russ. & Ry. C. C. R.

303. So on an indictment for extortion, alleging that the defendant extorted twenty shillings, it is sufficient to prove that he extorted one shilling. Per Holt, J. *Rex v. Burdett*, *Ld. Raym.* 149. See also *Rex v. Gilham*, 6 T. R. 265. *Serjeant v. Tilbury*, 16 East. 416. *Rex v. Hill and Others*, 1 Stark. N. P. C. 369.

(l) *Rex v. Sutton*, 4 M. & S. 532.

(m) *Rex v. Marquis of Buckingham*, 4 Campb. 180.

prosequi entered, as to the one who stands second upon the verdict, before judgment can be given against the other. Thus, where two persons, Hempstead and Hudson, were indicted upon the statute of Anne for stealing in a dwelling-house to the value of 6*l.* 10*s.*, and the jury found Hempstead guilty as to part of the articles of the value of 6*l.*, and Hudson guilty as to the residue; the Judges (upon a case reserved) held, that judgment could not be given against both, but that upon a pardon or *nolle prosequi* as to Hudson, it might be given against Hempstead. (n)

2dly. It is to be considered with what precision of proof, those allegations, which cannot be disregarded in evidence, must be supported; or in other words, what is a fatal variance between a material averment in an indictment, and the evidence adduced in support of it. The general rule on this subject is, that a variance between the indictment and the evidence is not material provided the substance of the matter be found. (a)

Upon this principle where an indictment for the murder of a serjeant at mace of the city of London supposed that the sheriff of London, upon a plaint entered, made a precept to the serjeant at mace to arrest the defendant, and it appeared that there was not any such precept made, and that, by the custom of London, after the plaint entered, any serjeant *ex officio*, at the request of the plaintiff, might arrest a defendant, *absque aliquo precepto, ore tenus vel aliter*, it was holden that this statement of the precept was but circumstance not necessary to be supported in evidence, and that it was sufficient if the substance of the matter were proved without any precise regard to circumstance. (b) In an indictment for perjury in an answer to a bill in Chancery, the bill was stated to have been filed by A. against B. (the present defendant) and another; it appeared in evidence that it was filed against B., C., and D. but the perjury was assigned on a part of the answer which was material between A. and B.; and Lord Ellenborough held this not to be a fatal variance. (c)

And with respect to the proof of the offence charged the rule is universal, that it is sufficient if the evidence agree in substance with the averments in the indictment. Thus on an indictment for murder, it will be sufficient if the manner of the death proved agree in substance with that which is charged. Therefore if it appear that the party were killed by a different weapon from that described, it will maintain the indictment: as if a wound or bruise alleged to have been given with a sword be proved to have been given with a staff or axe; or a wound or bruise alleged to have been given with a wooden staff, be proved to have been given with a stone. So if the death be laid to have been by one sort of poisoning, and it turn out to have been by another, the difference will not be material. (d) But if a person be indicted for one species of

2dly. With what precision of proof the allegations which cannot be disregarded in evidence must be supported, and herein of Variance.

Rule that it will be sufficient to prove the substance of the issue.

Proof of offence charged.

(n) *Rex v. Hempstead, Russ. & Ry. C. C. R. 344. Ante, 54.*

(a) 1 East. P. C. c. 5. s. 115. p. 345.

(b) *Rex v. Mackally, 9 Co. 67 a. Ante, vol. 1. p. 474.*

(c) *Rex v. Benson, 2 Campb. 508. S. P. by Abbott, C. J. Rex v. Powell, Ry. & Mood. N. P. C. 101.*

(d) *Ante, vol. 1. p. 467.* So where an indictment on stat. 43 Geo. 3. c. 58. s. 2. charged the prisoner with

killing, as by poisoning, he cannot be convicted by evidence of a species of death entirely different, as by shooting, starving, or strangling. (e) So upon an indictment against Matthew Kelly for murder, the charge was that the prisoner with a certain piece of brick, which he then and there held in his right hand, struck and beat the deceased, thereby giving to him with the piece of brick aforesaid, one mortal wound and fracture, of which he died: it appeared probable upon the evidence, not that the prisoner struck with the piece of brick, but that he struck with his fist, and that the deceased fell from the blow upon the piece of brick, and that the fall upon the brick was the cause of the death. The jury found that this was the case. As the indictment contained no charge of throwing the deceased down, the learned Judge who tried the prisoner inclined to think the evidence did not correspond with the charge, and reserved the point for the consideration of the Judges; who were unanimously of opinion that the means of death were not truly stated, and that the variance was fatal. (f) So where the indictment stated that the prisoner assaulted the deceased, and struck and beat him on the head, and then and there gave him divers mortal blows and bruises of which he died; and the evidence was that the prisoner knocked the deceased down by a blow on the head, and that in falling down upon the ground he received the injury which caused his death; the judges in this case also held that, the cause of death not being truly stated, the prisoner could not be convicted. (g) If the indictment charges that A. gave the mortal blow, and that B. and C. were present, aiding and abetting, &c., but on the evidence it appears that B. struck, and that A. and C. were present, aiding, &c. this is not a material variance, for the stroke is adjudged in law to be the stroke of every one of them, and is as strongly the act of the others, as if they all three had held the weapon, and had altogether struck the deceased. The identity of the person, supposed to have given the stroke, says Mr. Justice Foster, is but a circumstance, and in this case a very immaterial one. (h)

Matters of inducement.

"The cases which relate to the necessity of proving particular averments," said Mr. Justice Chambre in the case of *Turner v. Eyles*, (a) "only distinguish between that which is material, and that which is impertinent; but make no distinction between that

having administered to a woman a decoction of a certain shrub called *savin*; and it appeared upon the evidence that the prisoner prepared the medicine which he administered, by pouring boiling water on the leaves of a shrub; the medical men who were examined stated, that such a preparation is called an *infusion*, and not a decoction, (which is made by boiling the substance in the water); upon which the prisoner's counsel insisted that he was intitled to an acquittal, on the ground that the medicine was mis-described. But Lawrence, J., overruled the objection, and said that infusion and decoction

are *ejusdem generis*, and that the variance was immaterial; that the question was, whether the prisoner administered any matter or thing to the woman to procure abortion, *Rex v. Phillips*, 3 Camb. 74.

(e) See the cases on this subject collected, *ante*, vol. 1. p. 467.

(f) *Rex v. Matthew Kelly*, Ry. & Mood. C. C. R. 113.

(g) *Rex v. Thompson*, Ry. & Mood. N. P. C.

(h) *Ante*, vol. 1. p. 432. *Rex v. Mackally*, 9 Rep. 67 b. Post. 351. 1 Phil. Ev. 194.

(a) 3 B. & P. 463.

"which is inducement, and that which is the immediate cause of action." The same learned Judge in *Smith v. Taylor*, (b) observed that "the rules of evidence, as applicable to the allegations of a declaration, depend upon the way in which the facts alleged are introduced; if they be mere matters of inducement, they do not require such strict proof as those allegations which are precisely put in issue between the parties." And Mr. Justice Buller in *Gwinnet v. Phillips*, (c) laid down that averments which are merely inducement need not be precisely proved. The result of these authorities appears to be, that there is no difference between substantive averments and those which are only inducement, as to the necessity of proving them in some degree: but that the latter do not require such strict proof as the former. (d)

But any difference in substance between the statements in the indictment and the evidence, as to the offence charged, will be fatal. Thus where an indictment for obtaining money under false pretences stated that the defendant pretended *he had paid a sum of money into the Bank of England*; and it appeared in evidence that he said generally, *the money had been paid into the Bank of England*, Lord Ellenborough held it a fatal variance, and acquitted the defendant. (i) Where the prisoner was indicted (on the repealed statute 15 Geo. 2. c. 34.) for stealing a cow, and it appeared in evidence that the animal stolen was a heifer, it was holden a fatal variance by the twelve Judges, who were of opinion that as the statute mentioned both heifer and cow, it must be considered as using one term in contradistinction to the other. (j) Upon the same principle, where two prisoners were tried on the above-mentioned statute, on a charge of stealing five sheep, and upon the evidence they appeared to be lambs, the Judges held that the prisoners could not be convicted, as the statute mentioned both sheep and lambs. (k) So where on an indictment under Lord Ellenborough's act the prisoner was charged with *cutting* I. S., and the evidence was that the wounds were inflicted by *stabbing* and not by cutting, the Judges held that as the statute uses the alternative "*stab or cut*," the variance was fatal. (l) If, on an indictment for perjury, the oath is stated to have been taken

Instances of
fatal vari-
ances.

(b) 1 N. R. 210.

(c) 3 T. R. 646.

(d) See acc. 1 Phill. Ev. 195. But Mr. Starkie in his *Treatise on Evidence*, p. 1551. n. (x) observes that the distinction between the gist, and that which is the inducement is not always clear. If by *inducement* such averments only be meant as are not material, but which, if struck out, would leave a valid charge behind, there is no question; but if the term include essential and material averments, then proof being necessary, *legal proof* is essential, and that must, it should seem, depend upon the nature of the allegation itself, and not upon its mere order or connection in point of time, or otherwise, with other material averments. On the

other hand, it is certain, that whenever an allegation is material and essential, whether it fall within the scope of the term inducement, or not, or whatever its connection may be in the order of time, or otherwise, with the other essential averments, it must be proved according to the precise and particular, though superfluous, description with which it is encumbered. *Ibid.*

(i) *Rex v. Plestow*, 1 Campb. 494.

(j) *Cook's case*, 1 Leach 105. 2 East P. C. c. 16. s. 48., *ante* p. 185.

(k) *Rex v. Loom, Crisp, and Baxter*, Ry. & Mood. C. C. R. 162.

(l) *Rex v. M'Dermot, Russ. & Ry.* C. C. R. 356. See also *Rex v. Douglass*, *ante*, 309.

at the assizes, before Justices assigned to take the said assizes, it will be a fatal variance if the oath was administered when the Judge was sitting under the commission of Oyer and Terminer, and gaol delivery. (a) In an indictment on the 43 Geo. 3. c. 58. the intent laid was to murder, to disable, or do some grievous bodily harm; the intent found by the jury was to prevent being apprehended; it was held by the Judges on a case reserved, that a conviction could not be supported. (b) Where the prisoner was charged with being at large after an order for his transportation, and the indictment stated that his Majesty extended his mercy to him upon condition of his being transported for life beyond the seas: and it appeared in evidence that the condition upon which he received the royal mercy was not general, as the indictment stated, but specific, that he should be transported to New South Wales or some of the islands adjacent, the Judges held the conviction wrong. (c)

Misnomer of party whose existence is essential to the charge.

The name of any party whose existence is essential to the charge must be proved in conformity to that laid in the indictment, for a misnomer of him is usually fatal. (m) And if such person be described as a certain person to the jurors unknown, and it appear in evidence that his name clearly was known, the prisoner cannot be convicted. (n) Where a person is described by name simply, without addition, proof that there are two persons of that name is no variance, for the allegation is still true. Upon an indictment for an assault upon Elizabeth Edwards it appeared that there were two of that name, mother and daughter, and that in fact the assault had been made on the daughter; but the conviction was held to be good. (o) The prosecutor may be des-

(a) *Rex v. Lincoln*, Russ. & Ry. C. C. R. 421. But in an indictment for perjury alleged to have been committed on the trial of a cause before one of the Judges of the King's Bench, without *prout patet per recordum*, it is no variance that the *postea* alleges the trial to have taken place before the Lord Chief Justice, the cause having, in fact, been tried before the Judge specified; by Lord Tenterden, *Rex v. Coppard*, 1 Mood. & Malk. 118. So where the indictment alleged that the cause came on to be tried before E. W., one of the Judges, &c., and it was stated in the *nisi prius* record in the usual form that the cause was tried before the two judges of assize one of whom was E. W., it was held no variance, *Rex v. Alford*, 14 East 218.

(b) *Rex v. Duffin and Marshall*, Russ. & Ry. C. C. R. 365.

(c) *Fitzpatrick's case*, Russ. & Ry. C. C. R. 512.

(m) 3 Stark. Ev. 1578. See *ante*, 707. as to the misnomer of the person stated to be the owner of the dwelling-house, in burglary, and on an indict-

ment under the Black Act. On an indictment for stealing in a dwelling-house to the value of 5*l.*, the name of the owner of the house must be proved as laid. *Ante*, p. 54. So on an indictment for robbing a dwelling-house in the day time, some person being therein, the name of some person who was in the house at the time must be correctly stated, *Rex v. Kelly*, Carr. Suppl. 42. The stat. 7 G. 4. c. 64. extends only to remedy the misnomer of the defendants, when pleaded in abatement.

(n) 1 East. P. C. 651. *Rex v. Robinson*, Holt N. P. C. 595. *Rex v. Walker*, 3 Campb. 264. *Rex v. Deakin and Smith*, 2 Leach 863. But if the charge against an accessory is that the principal felony was committed by persons unknown, it is no objection that the same grand jury have found a true bill imputing the principal felony to I. S. *Rex v. Bush*, Russ. & Ry. C. C. R. 372.

(o) *Rex v. Peace*, 3 B. & A. 580. The court said "The question here is, not whether the party has been rightly described, but who the party

cribed by the name he has assumed, though it is not his right name; thus, where the goods stolen were laid to be the property of Mary Johnson, and the prosecutrix stated that her original name was Mary Davies, but that she had been called and known by the name of Mary Johnson, and not Mary Davies, for the last five years, and had not taken the name of Johnson for any purpose of concealment or of fraud; the Judges, on a case reserved, were of opinion that the time the prosecutrix had been known by the name of Johnson warranted her being called so in the indictment. (p) But where on the indictment of Frances Clarke, for the murder of "George Lakeman Clarke, a base born infant male child," it appeared in evidence that the deceased child was a bastard son of the prisoner, and that she murdered it, as charged in the indictment, but that the child was christened George Lakeman, being the names of its reputed father, and that it was called George Lakeman, and not by any other name known to the witnesses, and that the prisoner called it George Lakeman; the Judges held that as the child had not obtained his mother's name by reputation, he was improperly called Clarke in the indictment, and as there was nothing but the name to identify him in the indictment the conviction could not be supported. (q) Where an indictment for larceny laid the goods stolen to be the property of *Victory Baroness Turkheim*, and the prosecutrix proved that Baroness Turkheim was her title only, and no part of her proper name, but that she was not only reputed to possess that title, but did actually possess it in right of an estate inherited from her father and that she had constantly and uniformly acted in and been known by that appellation, but that her name without her title was Selina Victoria; the Judges held the description sufficient. (r)

But if the name proved be *idem sonans* with that in the indictment, and different in spelling only, the variance will be immaterial. Thus Segrave for Seagrave is no variance, (s) nor is Benedetto for Beniditto. (t) So on an indictment for committing an offence on one John Whyneard, it appeared that his name was spelt Winyard, but it was pronounced Winnyard; and the Judges on a case reserved, held that the prisoner had been rightly convicted. (u) But an indictment charging the prisoner with having personated "Peter M'Cann" is not supported by evidence that he personated "Peter M'Carn." (v) So it has been decided that

Idem sonans.

is who is described in the indictment as having been assaulted." But generally if the father and son be both named A. B., by A. B. simply the father shall be intended, *Wilson v. Stubbs*, Hob. 330. *Leput v. Brown*, 1 Salk. 7. *Sweeting v. Fowler*, 1 Stark. N. P. C. 106. 3 Stark. Ev. 1580.

(p) *Rex v. Norton*, Russ. & Ry. C. C. R. 510.

(q) *Rex v. Frances Clark*, Russ. & Ry. C. C. R. 358.

(r) *Sull's case*, 2 Leach 861. An

indictment for a robbery on an unmarried woman in her maiden name is good, although she marry before the indictment is found, *Rex v. Turner*, 1 Leach 536.

(s) *Williams v. Ogle*, 2 Stra. 889.

(t) *Abitbol v. Beniditto*, 2 Taunt. 401.

(u) *Rex v. Foster*, Russ. & Ry. C. C. R. 412.

(v) *Rex v. Tannet*, Russ. & Ry. C. C. R. 351.

"Shakespeare" cannot be considered as *idem sonans* with "Shakepear."^(w)

Variance between writings, &c. stated in indictment and produced in evidence.

9 Geo. 4. c. 15.

Many fatal variances have arisen, in cases where it is necessary to state a record, deed, or other writing in the indictment, between such statement, and the record, deed, or writing, when produced in evidence.^(x) Where the matter of a written instrument is introduced in pleading by the words "according to the tenor following," or "of the tenor following," or "in the words and figures following," or "in the words and matter following," or in fact any words which imply that a correct recital is intended, any the slightest variance between the instrument set out, and that produced in evidence is fatal.^(y) But a most salutary statute, 9 Geo. 4. c. 15. has recently passed to provide against variances of this description, in cases of misdemeanors; which after reciting that "great expence is often incurred, and delay or failure of justice takes place at trials, by reason of variances between writings produced in evidence and the recital or setting forth thereof upon the record on which the trial is had, in matters not material to the merits of the case, and such record cannot now in any case be amended at the trial, and in some cases cannot be amended at any time," enacts "it shall and may be lawful for every court of record holding plea in civil actions, any Judge sitting at Nisi Prius, and any court of Oyer and Terminer and general gaol delivery in England, Wales, the town of Berwick upon Tweed, and Ireland, if such Court or Judge shall see fit so to do, to cause the record on which any trial may be pending before any such Judge or Court in any civil action, or in any indictment or information for any misdemeanor, when any variance shall appear between any matter in writing or in print produced in evidence, and the recital or setting forth thereof upon the record whereon the trial is pending, to be forthwith amended in such particular by some officer of the Court, on payment of such costs (if any) to the other party as such Judge or Court shall think reasonable; and thereupon the trial shall proceed as if no such variance had appeared; and in case such trial shall be had at Nisi Prius, the order for the amendment shall be indorsed on the postea, and returned together with the record; and thereupon the papers, rolls, and other records of the court from which such record issued, shall be amended accordingly."

Proof of place laid.

On the trial of indictments, generally speaking, it will be sufficient to shew that the offence was committed in some place within the county or other division; and it seems to be agreed, says Mr. Serjeant Hawkins,^(z) that the mistake of the place, in which an offence is laid, will not be material upon the evidence, on the plea of not guilty, if the fact be proved at some other place in the same county. Although the offence must be proved to have been committed in the county, where the prisoner is tried, yet, after such

(w) *Rex v. Shakespeare*, 10 East. 83. So *Tarbart for Tabart* is a fatal variance in a bail piece. *Bingham v. Dickie*, 5 Taunt. 14.

(x) See the cases collected in 3

Stark. Ev. 1586 to 1604.

(y) 2 East. P. C. 976. *Arch. Cr. Pl.* 66.

(z) 2 P. C. c. 25. s. 84.

proof, the acts of the prisoner in any other county, tending to establish the charge against him, are properly admissible in evidence. (a) This has been determined to be the rule in cases of high treason, and must equally apply to cases of conspiracy and felony. (b) Where a felony is stated to have been committed at a certain place named in the indictment, and there is no such place in the county, it is said that the indictment is void; (c) but in a recent case, *Rex v. Dowling* and another, (d) tried before Mr. Justice Littledale, where an indictment for highway robbery laid the offence in the parish of St. Thomas, Pensford, in the county of Somerset, and it was objected by the counsel for the prisoner, that there was no proof that there was any such parish in the county, all the witnesses swearing to the parish of Pensford, and not St. Thomas, Pensford; the learned Judge said the objection was not valid: and that he once reserved a case from the Oxford circuit on that ground, and a great majority of the Judges held, that it was not necessary to prove affirmatively in the case for the prosecution, that such a parish as that laid in the indictment exists within the county, and that they expressed a doubt how they should hold, even where it was proved negatively for the prisoner that there was no such parish.

Prosecutor need not prove affirmatively that there is such a place within the county.

To the above rule, as to the parish and place being immaterial, there are some exceptions: as, if the statute upon which the indictment is framed give the penalty to the poor of the parish in which the offence was committed, the offence must be proved to have been committed in the parish laid in the indictment. (e) So on an indictment against a parish for not repairing a highway, the part of the road out of repair must be proved to be within the parish. (f) So it has been said, that where an injury is partly local and partly transitory, and a precise local description is given, a variance in proof of the place is fatal to the whole; for the whole being one entire fact, the local description becomes descriptive of the transitory inquiry. (g)

Exceptions as to proof of place laid.

In criminal prosecutions, from the highest offence to the lowest, it is unnecessary to prove the time of committing the offence precisely as laid, unless that particular time is material: and the facts may be proved to have occurred on any day previous to the finding of the bill by the grand jury. (h) In high treason, evidence may be given of an overt act, either before or after the day specified in the indictment; the particular day is not material in point of proof, and is merely matter of form. (i) And where an indictment for a misdemeanor contained several counts, stating several misdemeanors of the same kind, and alleging the same day in each count as the day on which they were committed, the prosecutor was allowed to give evidence of such misdemeanors on different days. (j)

Proof of time.

(a) 1 Phil. Ev. 206.

(b) *Ibid.*

(c) *Ibid.* referring to stat. 9 H. 5. st. 1. c. 1. s. 3. 3 Campb. 77.

(d) Ry. & Mood. N. P. C. 433.

(e) Archb. Cr. Pl. 63.

(f) *Ibid.* *Ante*, vol. 1. 331.

(g) 3 Stark. Ev. 1571. citing *Rex v. Cranage*, Salk. 385.

(h) 1 Phil. Ev. 203. See also *ante*, p. 537.

(i) *Ibid.*

(j) *Rex v. Levy* and others, *cor. Abbott*, C. J., 2 Stark. 458.

Proof of value.

It is immaterial, in general, whether the value ascribed to property in the indictment be proved or not; especially since the stat. 7 & 8 Geo. 4. c. 28. has abolished the distinction between grand and petit larceny. Where value is essential to constitute an offence, as where a bankrupt is indicted for concealing property to the amount of 20*l.*(*k*) and the value is ascribed to many articles collectively, the offence must be made out as to every one of those articles; the grand jury having ascribed that value to those articles collectively.(*l*)

Videlicet.

It has been considered a rule, that the want of a videlicet will in some cases make an averment material that would not otherwise be so; as, if a thing which is not material is positively averred without a videlicet, though it was not necessary to be so, yet it is thereby made material, and must be proved; and that, therefore, where a party does not mean to be concluded by a precise sum or day stated, he ought to plead it under a videlicet, for if he do not, he will be bound to prove the exact sum or day laid; it being a settled distinction, that where any thing which is not material is laid under a videlicet, the party is not concluded by it; but he is, where there is no videlicet.(*m*) But it is by no means generally true, that the omission of a videlicet will make it necessary to prove the particular sum or day, &c. strictly, as laid,(*n*) for the want of a videlicet will never do harm where, from the nature of the case, the precise sum, date, magnitude, or extent is immaterial.(*o*)

(*k*) Altered to 10*l.* by 6 Geo. 4. c. 16. s. 112.

(*l*) *Rex v. Forsyth, Russ. & Ry. C. C. R. 274.*

(*m*) 2 Saund. 291 c. in note (1) to

Dakin's case.

(*n*) 1 Phil. Ev. 202. (*n*).

(*o*) *Ibid.* 3 Stark. Ev. 1558. *Rex v. Gilham*, 6 T. R. 265.

CHAPTER THE FIFTH.

OF WRITTEN EVIDENCE.

SECTION I.

Of the Proof and Effect of—1. Public Documents.—2. Private Documents.

1st. OF the proof and effect of public documents. Acts of parliament are either public or private. The printed statute-book is evidence of a public statute, not as an authentic copy of the record itself, but as hints of that which is supposed to be lodged in every man's mind already. (y) A private act of parliament is usually proved by a copy examined with the parliament roll. (z) In many private acts a clause is inserted, directing that the act shall be deemed and taken to be a public act, or that a copy printed by the King's printer shall be admitted in evidence. By stat. 41 Geo. 3. c. 90. s. 9., copies of the statutes of Great Britain and Ireland prior to the union, printed by the printer duly authorised, shall be received as conclusive evidence of the several statutes in the courts of either kingdom. (a)

Public documents.

Statutes.

The preamble of an act of parliament, reciting that certain outrages had been committed in particular parts of the kingdom, was adjudged by the Court of K. B. to be admissible in evidence, for the purpose of proving an introductory averment in an information for a libel, that outrages of that description had existed. (b)

Preamble proof of facts recited.

The journals of the House of Lords or of the House of Commons are evidence in criminal cases as well as civil, and may be proved by examined copies: but the printed journals are not evidence. (c) An unstamped copy of the minutes of the reversal of

Journals of the Houses of Parliament.

(y) Gilb. Ev. 10.
(z) Bull. N. P. 225.
(a) Rosc. Ev. 43.

(b) *Rex v. Sutton*, 4 M. & S. 532.
(c) *Lord Melville's case*, 24 How. St. Tr. 683. Rosc. Ev. 43.

a judgment in the House of Lords, without more of the proceedings, is evidence of the reversal.(d)

Gazette.

Proclamation.

Articles of war.

Recital in proclamation proof of facts recited.

Proof of records.

On an issue of *nul tiel* record.

The public acts of government, and acts by the King in his political capacity, are commonly announced in the Gazette, published by the authority of the Crown; and of such acts announced to the public in the Gazette, the Gazette is admitted in courts of justice to be good evidence.(e) A proclamation for reprisals, published in the Gazette, is evidence of an existing war.(f) Proclamations for a public peace, or for the performance of a quarantine, and any acts done by or to the King in his regal character, may be proved in this manner; and upon the same principle, articles of war, purporting to be printed by the King's printer, are allowed to be evidence of such articles.(g) A Gazette, in which it was stated, that certain addresses had been presented to the King, has been adjudged to be proper evidence, to prove an averment of that fact in an information for a libel;(h) for they are addresses, said Lord Kenyon, of different bodies of the King's subjects, received by the King in his public capacity, and they thus become acts of state. And in *Rex v. Forsyth*,(i) the twelve Judges seemed to think that the production of the Gazette would be sufficient, without proof of its being bought at the Gazette printer's, or where it came from. In the case of *The King v. Sutton*,(k) the Court of King's Bench determined, that the King's proclamation, (which recited, that it had been represented that certain outrages had been committed in different parts of certain counties, and offered a reward for the discovery and apprehension of offenders,) was admissible in evidence, as proof of an introductory averment in an information for a libel, that acts of outrages of that particular description had been committed in those parts of the country.

Records are proved either by producing the record itself, or by an exemplification, or by a copy. When *nul tiel* record is pleaded, the record, if a record of the same Court, is produced and inspected by the Court: if a record of an inferior Court, it is proved by the tenor of the record certified under a writ of *certiorari* issued by the superior Court: if a record of a concurrent superior Court, it is proved by the tenor certified under a writ of *certiorari*, issued out of Chancery, and transmitted thence by writ of *mittimus*.(l) The issue of *nul tiel* record seldom occurs in criminal

(d) *Jones v. Randall*, Cowp. 17. But a resolution of either House is not evidence of the truth of the facts there affirmed; and therefore, in the case of *Titus Oates*, who was charged with having committed perjury on the trial of persons suspected of the popish plot, a resolution in the journals of the House of Commons, asserting the existence of the plot, was not allowed to be evidence of that fact. 4 St. Tr. 39. 1 Phil. Ev. 367.

(e) 1 Phil. Ev. 387.

(f) *Ibid.*

(g) *Ibid.*

(h) *Rex v. Holt*, 5 T. R. 436. S. C.

2 Leach 593.

(i) *Russ. & Ry. C. C. R.* 277. *Ante*, 251.

(k) 4 M. & S. 546.

(l) *Tidd*. 801, 804. *Rosc. Ev.* 43. Where a record of a Court of Quarter Sessions is pleaded in a Court of Oyer and Terminer, or the converse, it ought, in strictness, to be proved as above stated: but the practice, it is said, is to apply simply to the clerk of the peace, or clerk of assize, who will make it out for you without writ, or will attend with the record itself at the trial. *Arch. Cr. Pl.* 82.

cases, except in the instance of a plea of *auterfois acquit*, &c. (m) When *nul tiel* record is not pleaded, but it is necessary to prove a record in support of some allegation in the pleadings, the record may be proved either by an exemplification or a copy. Exemplifications are either under the great seal or under the seal of the court in which the record is produced, and are admissible without proof of the genuineness of the seal. (n) A record may also be proved by an examined copy, except upon the issue of *nul tiel* record. The copy must be proved by some witness who has examined it line for line with the original, or who has examined the copy while another read the original. (o) It ought to appear, that the record from which the copy was taken was seen in the hands of the proper officer, or in the proper place for the custody of such records. (p) So an office copy in the same court, in the same cause, is equivalent to a record; but in another court, or in another cause in the same court, the copy must be proved. (q) In order to prove a verdict, a copy of the whole record, including the judgment, is necessary, for otherwise it would not appear but that the judgment had been arrested, and a new trial granted. (r) Records properly produced in evidence are conclusive against those who are parties to them:—thus, a record of conviction of a parish for not repairing a road, is for ever afterwards evidence of their liability to repair; (s) but it is not conclusive as against other parties, except as to the fact that the persons charged have been convicted, (t) therefore an accessory may controvert the guilt of his principal, notwithstanding the record of his conviction. (u) In order to give evidence of a writ, if it is the gist of the proceeding, it must be proved by a copy of the record after its return: but where the writ is only inducement, the fact of taking out the writ may be proved without a copy, because possibly the

In other cases.

Effect of records in evidence.

Proof of writ.

(m) Upon this plea, the proof of the issue lies on the defendant, and he will have to prove the record of acquittal: and also it has been said, the averments of identity in his plea. 1 Arch. Cr. Pl. 56. But this seems doubtful, for if the replication is *nul tiel* record, it should seem to admit the identity. The principal decisions regarding the plea of *auterfois acquit*, belonging rather to the law of criminal pleading than of evidence, will be found *ante*, p. 38, 370, 544. See also *Rex v. Sheen*, 2 Carr & P. 634., from which it appears, that if the prisoner *could* have been legally convicted on the first indictment, upon any evidence that *might* have been adduced, his acquittal on that indictment may be successfully pleaded to a second indictment.

(n) *Rosc. Ev.* 44. *Tooker v. Duke of Beaufort*, Sayer 297.

(o) *Reid v. Margison*, 1 Campb. 469. It is not necessary for the persons examining to exchange papers,

and read them alternately. *Gyles v. Hill*, *ib. n.* *Rosc. Ev.* 44.

(p) *Adamthwaite v. Synge*, 1 Stark. 183. 4 Campb. 372. S. C. *Rosc. Ev.* 44.

(q) *Rosc. Ev.* 44. *Burnand v. Nerot*, 1 Carr & P. 578.

(r) *Bull. N. P.* 236. But the *nisi prius* record, with the *postea* endorsed, is sufficient evidence that the cause came on to be tried. *Pitton v. Walker*, 1 Str. 162.

(s) *Rex v. St. Pancras*, Peake N. P. C. 219.; but see 2 Saund. 160. *Ante*, Vol. I. 332.

(t) See *Rex v. Shaw and Others*, Russ. & Ry. C. C. R. 526., where, upon an indictment for delivering instruments to a prisoner to facilitate his escape from gaol, it was held that the record of his conviction being produced by the proper officer, no evidence was admissible to dispute what it stated.

(u) *Rex v. Smith*, 1 Leach 288.

Proceedings in
courts of
equity.

Proceedings in
the ecclesi-
astical courts.

Proof of will.

Probate.

Proof of ad-
ministration.

Judgments of
inferior courts.

writ has not been returned, and then it is no record. (x) An answer in Chancery is proved by the production of the bill and answer, or of examined copies of them; (y) but on proof by the proper officer that the bill has been searched for in the office, and not found, the answer may be read without the bill. (z) Depositions in a suit in Chancery are not in general admissible without proof of the bill and answer, unless so ancient that no bill or answer can be found; (a) but an examined copy is admissible for the purpose of contradicting the testimony of the deponent when produced afterwards as a witness. (b) The proceedings in the ecclesiastical courts are proved in the same way as those in equity: and their sentences are received in the temporal courts as conclusive evidence of the fact adjudged, upon questions within their jurisdiction: but in a suit of jactitation of marriage, a sentence against the marriage is not conclusive, as it decides not directly, but only collaterally, on the validity of the marriage. (c) When it is necessary to shew a title to personalty under a will, or that a particular person is executor, the will cannot be read in evidence without some indorsement for the purpose of authentication; but the probate must be produced. (d) The seal of the ecclesiastical court on the probate proves itself. (e) Generally speaking, a probate unrepealed is conclusive evidence of the validity of the will; but on an indictment for forging a will, probate of that will unrepealed is not conclusive evidence of its validity, so as to be a bar to the prosecution. (f) To prove a probate revoked, an entry of the revocation in the book of the ecclesiastical court called the 'assignation book,' in which all causes are officially entered, is good evidence. (g) Administration is proved by the production of the letters of administration, or a certificate or exemplification thereof, granted by the ecclesiastical court, (h) or by the original book of acts, directing the grant of letters, or an examined copy of it. (i)

Judgments in a court-baron, county-court, or other inferior court, may be proved by the production of the book containing the proceedings of the court from the proper custody, and if not made up in form, the minutes of the proceedings will be evidence, or an exa-

(x) 1 Phil. Ev. 370.

(y) The recital in the jurat of the place where the answer purports to be sworn, is sufficient proof that the oath was administered at the place sworn. *Rex v. Spencer, Ry. & Mood. N. P. C. 97.*

(z) *Gilb. Ev. 49.* See as to the proof of the identity of the parties, *ante*, p. 549. An answer offered in evidence merely as an admission of the party on oath, is sufficiently proved by an examined copy, without proof of a decree, or the party's handwriting. *Lady Dartmouth v. Roberts, 16 East. 334. Rosc. Ev. 47.* See also *Ewer v. Ambrose, 4 B. & C. 25.*

(a) *Bull. N. P. 240. Gilb. Ev. 62.*

Rosc. Ev. 47.

(b) *Highfield v. Peake, Mood. & Malk. N. P. C. 109.*

(c) *Duchess of Kingston's case, 11 St. Tr. 262. Ante, Vol. I. 190.*

(d) *Rex v. Barnes, 1 Stark. N. P. C. 243.*

(e) *Kempton v. Cross, Cas. Temp. Hardw. 103. Rosc. Ev. 48.*

(f) *Rex v. Buttery and Macnamara, Russ. & Ry. C. C. B. 342.*

(g) *Rex v. Ramsbottom, 1 Leach 25. in note to Rhodes's case.*

(h) *Kempton v. Cross, Cas. Temp. Hardw. 103. Rosc. Ev. 48.*

(i) *Elden v. Kettel, 8 East. 187. Davis v. Williams, 13 East. 232.*

mined copy of such proceedings or minutes will be evidence.(a) The judgment of a foreign court must be proved by evidence of the handwriting of the judge of the court who subscribed it, and the authenticity of the seal affixed. In the case of *Henry v. Adey*,(b) the plaintiff, who sued here on a judgment obtained in the island of Grenada, was nonsuited, because he could not prove the seal affixed to be the seal of the island. And on a motion to set aside the nonsuit, the Court said, they could not take official notice, that the seal affixed was the seal of the island, which was necessary to be shewn, in order to prove the judgment, which it purported to authenticate; and that proving the judge's handwriting could not advance the proof of the seal, unless by considering him in the nature of a witness to it, which was not pretended.(c) If a colonial court possess a seal, it ought to be used for the purpose of authenticating its judgments, although it may be so much worn as no longer to make any impression.(d) If it is clearly proved, that the Court has not any seal, so that the document cannot be clothed with the form of a legal exemplification, it must be shewn to possess some other requisite to entitle it to credit; as, by proving the signature of the Judge upon the judgment.(e) An exemplification of a foreign judgment, that is, a copy authenticated under the seal of the court, is evidence of the judgment in the courts of this county:(f) but a document, purporting to be a copy of a judgment, made by the officer of the Court, is not admissible.(g) The written law of a foreign state must be proved by a copy duly authenticated.(h) Thus, when to prove the law of France, as to marriage, the French vice-consul produced a book, which he said contained the code of laws upon which he acted at his office; that it was printed at the office for the printing of the laws of France; and that it would have been acted upon in any of the French courts; it was ruled by Abbott, C. J., to be sufficient proof of the law.(i) The unwritten law of a foreign state may be proved by the parol evidence of witnesses possessing professional skill.(j) So a person of experience in the profession of the law of another country may state his opinion, what, according to the law of that country, would be the legal effect of the facts previously spoken to by the witnesses, taking the facts to be accurate. Thus a gentleman at the Scotch bar has been

Foreign judgment.

Proof of foreign laws.

(a) *Rex v. Hains*, per Holt Comb. 337. 12 Vin. Ab. Ev. A. b. 26. p. 99. Rosc. Ev. 47.

(b) 3 East. 221. 1 Phil. Ev. 379. See also *Buchanan v. Rucker*, 1 Campb. 63. *Flinnd v. Atkins*, 3 Campb. 215. in a note.

(c) The statute 6 Geo. 4. c. 133. s. 7. enacting that the common seal of the society of apothecaries of the city of London shall be received as sufficient proof of the authenticity of the certificate, to which such seal is affixed, does not make such certificate evidence without proof that the seal affixed is the genuine seal of the

society, *Chadwick v. Bunning*, Ry. & Mood. N. P. C. 306.

(d) *Cavan v. Stewart*, 1 Stark. N. P. C. 525.

(e) *Alves v. Bunbury*, 4 Campb. 28. 1 Phil. Ev. 379.

(f) *Black v. Lord Braybrook*, 2 Stark. N. P. C. 11, 12.

(g) *Appleton v. Lord Braybrook*, 2 Stark. N. P. C. 6, 7. 1 Phil. Ev. 380.

(h) *Clegg v. Levy*, 3 Campb. 166. Rosc. Ev. 48.

(i) *Lacon v. Higgins*, 3 Stark. 178.

(j) Per Gibbs, C. J., *Miller v. Kendrick*, 4 Campb. 155. Rosc. Ev. 48.

Irish judgment.

Conviction before justices of the peace.

Public books.

Registers.

Proof of public books by examined copies.

allowed to state his opinion, whether a marriage, as proved by the witnesses, would be valid according to the Scotch law. (*k*) A judgment obtained in one of the superior courts in Ireland, since the Union, is not a record in England. (*l*) Convictions before justices of the peace are proved by examined copies, which the clerk of the peace of the proper county will make out, upon an application for that purpose. (*m*) In many instances, public books are admitted in evidence to prove the facts recorded in them. The muster-book in the navy-office, has been admitted in evidence, to prove the death of a sailor; (*n*) the book from the master's office in the Court of King's Bench, to prove a person one of the attorney of that Court; (*o*) and the log-book of a man of war, which convoyed a fleet, to prove the time of the convoy's sailing. (*p*) Bank books are good evidence to prove the transfer of stock; (*q*) and on a prosecution for a libel published concerning a person in his office of treasurer of a parish, an entry in a vestry-book, stating that he was elected at a vestry duly held in pursuance of notice, has been considered sufficient evidence, to support an allegation in the indictment, that he was duly elected treasurer. (*r*) The day-book of a public prison, containing a narrative of the transactions of the prison, has been received upon the same principle, as proof of the time of a prisoner's commitment or discharge: (*s*) but it would not be admissible to prove the cause of his commitment. (*t*) So on an indictment for forging a seaman's will, an entry in a book called the assignation book, in which all causes are officially entered, was admitted to prove the probate revoked. (*u*) So the poll-books taken at an election for members of parliament, or at an election of a mayor, are evidence. (*v*) The registers of christenings, marriages, and burials, preserved in churches, are good evidence: (*w*) and in order to prove the register of a marriage, it is not necessary to call the attesting witnesses; but as the register affords no proof of the identity of the parties, some evidence of that fact must be given, as by calling the minister, clerk, or attesting witnesses, if they were acquainted with the parties; or the bell-ringers may be called to prove that they rung the bells, and came immediately after the marriage, and were paid by the parties; or the handwriting of the parties may be proved; or persons may be called who were present at the wedding dinner, &c. (*x*) Whenever an original is of a public nature, and admis-

(*k*) *Rex v. Wakefield and others*, Murray ed. p. 238.

(*l*) *Harris v. Saunders*, 4 B. & C. 411.

(*m*) Archb. Cr. P. C. 83.

(*n*) Bull. N. P. 249. *Rhodes's case*, 1 Leach 24.

(*o*) *Rex v. Cropley*, 2 Esp. N. P. C. 524.

(*p*) *D'Israeli v. Jowett*, 1 Esp. N. P. C. 427.

(*q*) *Breton v. Cope*, Peake. N. P. C. 30. *Marsh v. Colnet*, 2 Esp. N. P. C. 665.

(*r*) *Rex v. Martin*, 2 Campb. 100.

(*s*) *Rex v. Aickles*, 1 Leach 391.

(*t*) *Salte and others v. Thomas*, 3 B. & P. 188. 1 Phil. Ev. 395.

(*u*) *Ramsbottom's case*, 1 Leach 25. in note. It would have been no bar to the conviction had the probate been unrepealed. *Rex v. Buttery* and another, Russ. & Ry. C. C. R. 342.

(*v*) *Mead v. Robinson*, Willes. 224.

(*w*) Bull. N. P. 247.

(*x*) *Birt v. Barlow*, Dougl. 162. Rosc. Ev. 50.

sible in evidence, an examined copy is also admissible.(y) Thus, examined copies of the entries in the council-book, or of a licence preserved in the secretary of state's office,(z) of entries in the Bank books,(a) of entries in the books of the East India Company,(b) or in the books of the commissioners of the land-tax,(c) or of excise,(d) are allowed to be read in evidence. So an examined copy of a parish register is evidence:(e) but not an examined copy of the register of a marriage in the Swedish ambassador's chapel in Paris.(f) It seems, however, that the books of the King's Bench or Fleet prisons, which, as it has been just mentioned, are evidence of the time of a prisoner's discharge, are not such public documents, that a copy of them may be given in evidence.(g)

The judicial records of the King's Court are safely kept for public convenience, that any subject may have access to them for his necessary use and benefit; which was the ancient law of England, and is so declared by an act of parliament in the 46th year of Edward III.(h) But in the case of an acquittal on a prosecution for felony, a copy of the indictment cannot be regularly obtained without an order from the Court. This rule proceeds from an anxiety to protect prosecutors from being harassed by unfounded actions for malicious prosecutions, which actions cannot be maintained without proving the fact of the prosecution by the record or an examined copy of it; and it is therefore not usual to grant a copy of the record of acquittal, where there is any the least probable cause for the prosecution.(i) But the copy is admissible without proof of the order of the Court allowing a copy of the record; for though it be the duty of the officer, charged with the custody of the records of the Court not to produce a record, or give a copy of it but upon competent authority, yet if the officer, in neglect of his duty, shall have given a copy, or produces the original, the evidence in itself is unobjectionable, and must be received.(j) The rule is confined to cases of felony: in prosecutions for misdemeanors, the defendant is entitled to a copy of the record, as a matter of right, without a previous application to the Court.(k) A defendant on a criminal charge is not entitled to an inspection of the grounds upon which the prosecution is instituted;(l) and, therefore, neither in cases of treason

Inspection of records.

Copy of indictment after acquittal, how obtained.

In case of felonies.

In cases of misdemeanors.

Inspection of depositions.

(y) *Rosc. Ev.* 49. *Lynch v. Clerke*, 3 Salk. 154.

(z) *Eyre v. Palsgrave*, 2 Campb. 606.

(a) *Marsh v. Colnett*, 2 Esp. 665.

(b) Dougl. 593. n.

(c) *Rex v. King*, 2 T. R. 234.

(d) *Fuller v. Fotch*, Carth. 346.

(e) Bull. N. P. 247.

(f) *Leader v. Barry*, 1 Esp. 353.

(g) *Rosc. Ev.* 49. *Salte v. Thomas*, 3 B. & P. 190.

(h) 1 Phil. Ev. 405.

(i) *Tidd*. 647. In the case of Van-

dercomb and Abbott, 2 Leach 708. the prisoners, after their acquittal, applied for copies of the record, for the purpose of assisting them in their plea of *autrefois acquit*: the Court, however, refused to grant them copies, but ordered the officer to read over the indictment, slowly and distinctly, which was accordingly done.

(j) *Legatt v. Tollervey*, 14 East. 302.

(k) *Morrison v. Kelly*, 1 Black. Rep. 385. *Evans v. Phillips*, MS. Selw. N. P. 952. 1 Phil. Ev. 407.

(l) 1 Phil. Ev. 408.

Inspection of
public books.
Never granted
in criminal
cases.

2. Of the proof
of private do-
cuments.

nor of felony, has he any right to a copy of the depositions of the witnesses, who are to appear against him. *(m)* "The practice on "indictments at common law, and on informations upon particu-
lar statutes," said Mr. Justice Buller in *Rex v. Holland*, "shews
"it to be clear that the defendant is not entitled to inspect the evi-
dence on which the prosecution is founded, till the hour of
"trial." *(n)* Where civil rights are depending, a party has a right
to inspect, and take copies of such books, &c. as are of a *public*
nature, wherein he has an interest: *(o)* but a rule for inspecting a
public writing is never granted, where the party who has them in
his custody would, by producing them for inspection, disclose any
evidence of a criminal nature, or expose himself to a criminal
prosecution: for it is a constant and invariable principle that in
criminal cases, the party shall never be compelled to furnish evi-
dence against himself. *(p)*

2dly. Of the proof of private documents. The execution of all
written instruments which are attested, whether under seal or not,
must be proved by the subscribing witness, if he can be produced,
and is capable of being examined. Thus not only bonds and
other deeds, but attested notices to quit, *(i)* attested warrants to
distrain, *(k)* attested bills of exchange, or promissory notes, must
be proved by the attesting witness. And so strictly is this rule
observed, that the testimony of the attesting witness cannot be
dispensed with, though an acknowledgment of the obligor himself
be proved, admitting that he executed the bond, *(l)* or the defend-
ant has admitted the execution in his answer to a bill in Chan-
cery; *(m)* for though the party may acknowledge the bond, yet he
may not know every circumstance attending the execution; "a
fact may be known to the subscribing witness, not within the
knowledge or recollection of the obligor, and he is entitled to
avail himself of all the knowledge of the subscribing witness
relative to the transaction." *(n)* But where the attesting witness
is dead, *(o)* or blind, *(p)* or insane, *(q)* or infamous, *(r)* or has be-
come interested after the execution of the deed, *(s)* or absent in a
foreign country, or not amenable to the process of the superior
courts, *(t)* as where he is in Ireland, *(u)* or where he cannot be found
after diligent inquiry, *(v)* evidence of the witness's handwriting is

(m) 1 Phil. Ev. 400. In some species of treason, the prisoner is entitled to a copy of the indictment, *Ibid.*

(n) *Rex v. Holland*, 4 T. R. 691. In that case an information had been filed against an officer of the East India Company, on charges of delinquency founded upon a report of a board of enquiry in India: and the Court of King's Bench were of opinion, that he had no right to have an inspection of that report, and that the Court had no discretionary power to grant it.

(o) Tidd. 647.

(p) Tidd. 649.

(i) *Doe v. Durnford*, 2 M. & S. 62. And it makes no difference that the

party, upon whom the notice was served, read it and made no objection. *Ibid.*

(k) *Higgs v. Dixon*, 3 Stark. N. P. C. 210.

(l) *Abbot v. Plumbe*, 1 Dougl. 216.

(m) *Call v. Dunning*, 4 East. 53.

(n) *By Le Blanc, J.* 4 East. 53.

(o) *Anon.* 12 Mod. 607.

(p) *Wood v. Drury*, 1 Lord Raym. 734.

(q) *Currie v. Child*, 3 Campb. 283.

(r) *Jones v. Mason*, 2 Stra. 333.

(s) *Godfrey v. Norris*, 1 Stra. 34.

(t) *Prince v. Blackburn*, 3 East. 250.

(u) *Hodnet v. Foreman*, 1 Stark. N. P. C. 90.

(v) *Cunliffe v. Sefton*, 2 East. 183.

admissible. (w) In these cases it seems sufficient to prove the handwriting of the witness, without proving the handwriting of the party, unless with a view to establish the identity of the party; but slighter evidence of that fact would be sufficient. (x) And in a very late case Lord Tenterden held, that proof of the handwriting of the subscribing witness who was dead was sufficient, without any further proof of the identity of the parties than the identity of the name and description. (y) The handwriting of a party may be proved by a witness who has seen him write; and, if a witness states that he has only seen him write once, but thinks the signature is his handwriting, it is evidence to go to the jury, although he says that he can form no belief on the subject. (z) A written correspondence with the party, although the witness has never seen him write, will be sufficient to enable him to speak to the handwriting; for when letters are sent directed to a particular person, and on particular business, and an answer is received in due course, a fair inference arises, that the answer was sent by the person whose handwriting it purports to be. (a) So where a witness who had never seen the defendant, but had corresponded with a person of defendant's name living at Plymouth dock, where the defendant resided, and where, according to other evidence, there was no other person of the same name, stated that the handwriting in question was the handwriting of the person with whom he corresponded, the evidence was held sufficient. (b) It is an established rule, that handwriting cannot be proved by comparing the paper with any other papers acknowledged to be genuine. (c) A written instrument, which requires a stamp, in criminal as well as civil cases, is inadmissible in evidence, unless it be duly stamped, and no parol evidence will be received of its contents. Thus where the prisoner, being a clerk, receiving money on his master's account, gave to the debtor a receipt on plain paper; the receipt was held, by Bayley, J., not to be evidence against the prisoner on an indictment for embezzling the money so received. (d) But in certain cases unstamped written instruments have been received in evidence, when produced merely to prove something collateral, and not for the purpose of being enforced between the parties, and when it is not material to consider whether the instruments are good or available in law. (e) Thus a paper, purporting to be a bill of exchange or promissory note, may be given in evidence to support an indictment for forgery, or for uttering with a knowledge of the forgery. (f) So on an indictment on 7 Geo. 4. c. 50. s. 2. for steal-

Handwriting
how proved.

Stamps.

Unstamped in-
strument for
collateral pur-
poses.

(w) *Rosc. Ev.* 52. See also what will be considered a diligent enquiry so as to let in such evidence, *ibid.*

(x) *Ibid.*

(y) *Page v. Mann, Mood. & Malk. N. P. C.* 79.

(z) *Garrels v. Alexander, 4 Esp.* 37. *Rosc. Ev.* 54. The signature of a person may be proved by a witness who has seen him write his surname only. *Lewis v. Sapio, 1 Mood. & Malk. N. P. C.* 39. by Abbott, C. J.,

overruling *Powell v. Ford, 2 Stark. c.* 39.

(a) Per Lord Kenyon, *Cary v. Pitt, Peake Ev. App.* 85. *Rosc. Ev.* 55.

(b) *Harrington v. Fry, 1 Ry. & Mood.* 90. *Rosc. Ev.* 15.

(c) *Ante, 379.* 1 *Phil. Ev.* 471.

(d) *Rex v. Hall, 3 Stark. N. P. C.* 67.

(e) *Ante, p.* 341.

(f) *Ante, p.* 341. 1 *Phil. Ev.* 500.

ing a letter, where it appeared that the check or draft which the prisoner had taken out of the letter was drawn on unstamped paper, it was objected on behalf of the prisoner, that it could not be received in evidence, even as a medium to shew that he had stolen the letter; but the Court overruled the objection, being of opinion that the draft, though unstamped, might be received in evidence for collateral purposes, though not for the purpose of recovering the money contained in it.^(g) But in a modern case of an indictment for feloniously setting fire to a house with intent to defraud an insurance company, a policy of insurance was given in evidence on the part of the prosecution, by which the prisoner's goods, in a house described in the policy, were insured against fire, and upon which a memorandum was indorsed stating, that the goods insured had been removed from the house described in the policy to another house mentioned in the memorandum. In this house, so mentioned in the memorandum, the prisoner was charged with having committed the felony. The policy was properly stamped, but the memorandum had no stamp; and upon this circumstance, an objection was taken on behalf of the prisoner, that it was essentially necessary to shew, in support of the charge, that there subsisted a legal effective contract; and that, by the express provisions of the stamp acts, the memorandum in question, not being stamped, could not be given in evidence, or be good or available in any manner whatever. The point being reserved for the consideration of the twelve Judges, was argued before them; and the conviction was held to be wrong.^(h)

As to other points respecting the proof and effect of public and private documents, since they are of rare occurrence in criminal proceedings, it is thought more advisable to refer the reader to the general Treatises on the Law of Evidence, than to encumber this work with any notice of them.

^(g) Pooley's 2d case, 2 Leach 900. S. C. 1 East. P. C. Addenda xvii. *Ante*, 239. The prisoner had been previously tried on the first section of the act, which makes it a capital felony for any servant of the post-office to secrete any letter containing a bank note, or any warrant or draft for the payment of money: and it was held that a draft which required a stamp, but was unstamped, was not a draft for the payment of money

within the act. Pooley's case, 2 Leach 887. *Ante*, 231.

^(h) Gilson's case, 2 Leach 1007. Russ. & Ry. C. C. R. 138. *Ante*, 496. Lord Ellenborough, Mansfield, C. J., Wood, B., Grose, J., and Heath, J., were of opinion the conviction was right. The Lord Chief Baron, Thompson, B., Lawrence, J., Le Blanc, J., Chambre, J., and Graham, B., were of the contrary opinion.

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